IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 180.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of ZIMMERMANN & FORSHAY, as brokers,

Plaintiffs-Appellants,

against

HOWARD SUTHERLAND, as Alien Property Custodian of the United States; FRANK WHITE, as Treasurer of the United States; and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

SAMUEL R. WACHTELL,
Solicitor and Counsel for Appellee,
Wiener Bank Verein.

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Report of Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported under the title of *Zimmermann et al.* v. *Hicks et al.*, 7 Fed. (2nd Series) 443.

The opinion of the United States District Court for the Southern District of New York is reported under the title of *Zimmermann et al.* v. *Miller*, 2 Fed. (2nd Series) 29. Thomas W. Miller, who was Alien Property Custodian at the time the case was originally tried, was succeeded by Frederick C. Hicks, who was Custodian at the time the appeal was heard in the Circuit Court. He has, in turn, been succeeded by Howard Sutherland, who is the present Custodian.

Statement.

The suit was brought by the plaintiffs-appellants under Section 9 of the Trading with the Enemy Act (40 Stat. L. 419) to establish a debt owing to them by the defendant bank. The bill of complaint originally demanded judgment for the sum of $391,028.29, with interest at 6 per cent. from the 6th day of April, 1917. By amendment, the amount of this demand was reduced to $243,528.29, with interest at 5 per cent. from the 6th day of April, 1917. They recovered a judgment in the District Court for $50,919.97, with interest thereon from August 12, 1919, amounting to $14,766.80. Both parties appealed from this judgment. The Circuit Court of Appeals reversed the judgment of the District Court and directed the complaint to be dismissed on the merits.

Facts.

The appellants were plaintiffs in the District Court and the appellee Wiener Bank-Verein was a defendant. For convenience, the appellants will be referred to in this brief as the plaintiffs and the appellee Wiener Bank-Verein will be referred to as defendant bank.

The proof before the District Court consisted partly of oral testimony and partly of stipulations of fact. The pleadings were amended to conform to the facts stipulated (R. 35, fol. 103; R. 48, fol. 143).

Plaintiffs were engaged in business in New York as bankers and brokers in the general business of brokerage and foreign exchange. They specialized largely in foreign exchange and foreign currencies (R. 95, fol. 284; R. 97, fol. 290).

Defendant bank is a banking corporation organized under the laws of the Austro-Hungarian Empire. After the dissolution of that Empire it continued its corporate existence by validation of its charter by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States (R. 35, fol. 105; R. 36, fol. 106).

There is some evidence that prior to the outbreak of war between the United States and Austria, defendant bank had a "representative" in New York City who transacted some business with the plaintiffs on behalf of defendant bank (R. 103, fol. 307). There is no evidence of the extent of his agency. There is no evidence that his agency continued after the outbreak of the war. There is no evidence that he had any funds in his possession belonging to defendant bank. There is no evidence that he had authority to pay out such funds if he had them. And, finally, there is no evidence that the plaintiffs ever made a demand on him.

For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs had a bank account in kronen with defendant bank, in which plaintiffs, from time to time, made deposits in kronen for the purpose of providing for the payment of drafts and orders issued by them and drawn on and payable at defendant bank in Vienna (R. 36, fols. 106-107). The bal-

ance carried interest at the rate of 2½ per cent. per annum (R. 47, fol. 140).

Once every three months defendant bank rendered a statement of account to plaintiffs. This statement was in each case accompanied by a printed letter referring to the statement enclosed and requesting the recipient to "take notice of the general conditions contained within governing the relations with our Institution." The general conditions appended to the letter contained the following:

> "3. Unless otherwise agreed upon we are entitled to cancel existing connections at any time and according to our free decision.
>
> * * * * * *
>
> 11. The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be" (R. 39, fol. 115; R. 40, fol. 119; R. 42, fol. 126).

All the transactions in this case were with the main office at Vienna.

War was declared by the United States on Austria on December 7, 1917. Before the war, plaintiffs issued against this account in due course many orders for the payment of various sums. These orders were paid by defendant bank upon presentation during the war and after, as they came in (R. 108, fol. 233; R. 109, fol. 326).

Commercial relations between the United States and Austria were resumed on July 14, 1919.

Immediately thereafter, plaintiffs resumed their relations with defendant bank making large deposits and withdrawals (R. 108, fol. 324; R. 109, fol. 327; R. 110, fol. 330; R. 111, fol. 331).

Up to this point there is no evidence of any kind that plaintiffs ever demanded payment of their pre war balance from defendant bank.

On August 6, 1919, plaintiffs cabled defendant bank as follows:

> "Referring to our old balance will you consent to American Property Custodian paying out your former funds in his custody equivalent in dollars at March fifteen nineteen seventeen rate of eleven eighteen stop If you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop This will obviate law suits which we otherwise be compelled to institute" (R. 109, fol. 227; R. 110, fol. 228).

The purport of this communication was not understood by defendant bank and the following cable was sent in reply on August 12, 1919:

> "Your cable regarding our consent to Custodian incomprehensible wire details and reasons and transactions concerned" (R. 109, fol. 328).

To this cable of inquiry defendant bank never received an answer (R. 110, fol. 329).

On August 15, 1919, the plaintiffs cabled to defendant bank as follows:

> "Fifteen credit Credit Suisse Zurich francillion old Kronen against francillion new Kronen stop exchange our balance into new Kronen" (R. 109, fol. 326).

Defendant bank made the exchange requested (R. 109, fol. 327).

Thereafter, plaintiffs insisted upon re-establishing their pre war balance and the defendant bank re-established it accordingly (R. 111, fol. 333).

Prior to April 1, 1920, the plaintiffs refused to accept payment of the kronen they had on deposit in the defendant bank as allowed by the defendant bank either in kind or in United States currency at the rate of exchange then prevailing, but demanded the amount of said kronen as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of the war between the United States and Austria-Hungary, namely, 11.18 United States cents for each Austrian krone (R. 37, fol. 110; R. 46, fol. 138; R. 47, fol. 139).

During all the time when this bank account was maintained by the plaintiffs in the defendant bank, before, during, and after the war, there was in force in Austria a General Civil Law Code, which contained the following provision (Section 1425 enacted in the year 1812):

> "If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor" (R. 36, fol. 108; R. 37, fol. 110).

A dispute having thus arisen between the plaintiffs and defendant bank as to the basis of settling this pre-war kronen account, the amount thereof was deposited by defendant bank on April 1, 1920, pursuant to the Austrian statute in question in the Circuit Court for the District of Vienna, which was the appropriate court for making

such deposits (R. 37, fol. 111; R. 38, fol. 112). The amount deposited included accrued interest to the date of deposit at 2½ per cent. per annum (R. 47, fols. 140, 141).

Due notice of such action was thereupon given by defendant bank to plaintiffs (R. 38, fol. 112; R. 111, fol. 333; R. 112, fol. 335).

On March 15, 1919, the plaintiffs filed a notice of claim against the defendant bank with the Alien Property Custodian, under Section 9 of the Trading with the Enemy Act (R. 49, fol. 165; R. 56, fol. 168). There appears to be no identity between the claim described in this notice and the claim involved in this suit. The notice claims

> "moneys and securities due to claimant as follows:
> Cash Balance Dollars.....[illegible]
> Drafts.....2,951,027.33
> Securities.....1,000,000.00
> Interest accrued from 1/1/16 on cash balance at 6%."

The foregoing notice of claim was evidently abandoned. This suit is not based on it. The Circuit Court of Appeals in commenting on it (R. 139) says:

> "On this point of demand the evidence compels us to disagree with the court below. Passing the point that no demand was pleaded other than that of December 15, 1921, on the Custodian, it is argued that plaintiffs did in legal effect make several earlier demands, viz.: in March, 1919, by filing documents with the custodian and in August, 1919, by an interchange of letters and telegrams with both banks (the reference here is to the defendant bank and to Deutsche Bank).
>
> It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshay which had either been im-

pounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiff's own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established, plaintiffs expressed the desire to go on with pre-war business and maintain their old deposit accounts; and these desires were expressed after March, 1919."

On December 15, 1921, plaintiffs filed with the Alien Property Custodian another proof of claim under Section 9 of the Trading with the Enemy Act (R. 113, fol. 339; R. 121, fol. 363). The amount claimed was $391,028.29 with interest at 6 per cent. from April 6, 1917. The notice states:

> "This debt arises from a pre-war balance which claimant had with above mentioned enemy or ally of enemy and which said enemy or ally of enemy now owes this claimant, figured at the rate of exchange between March 6th and April 6, 1917, of 11.80 cents in U. S. Currency for each Austrian krone" (R. 121, fol. 361).

This suit is based on that notice of claim and the amount mentioned in this notice of claim is the same as the amount set out in the original bill of complaint.

As above stated, the complaint was subsequently amended by reducing the amount sued for from kronen 3,313,799.03, the number of kronen stated in the bill of complaint to be due and owing to the plaintiffs, to the sum of kronen 2,063,799.03, a reduction of kronen 1,250,000 (R. 19, fol. 55; R. 21, fol. 63). The reason for the amendment was that the plaintiffs wished to escape liability for some $140,000, which was the dollar equivalent of kronen purchases in March, 1917, aggregating the said total of

1,250,000 kronen (R. 99, fols. 295-297; R. 100, fols. 298-299; R. 101, fol. 301).

The plaintiffs have assigned thirteen assignments of error. None of these assignments of error is directed to any alleged error made by the Circuit Court of Appeals in holding that the court deposit by the defendant bank under the Austrian law was a discharge of its debt or in holding that the provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye (United States Treaty, Series No. 659) do not apply to this suit.

The defendant bank contends that:

(1) The Austrian law is the law by which the mutual rights and obligations of the plaintiffs and the defendant bank must be measured in this suit.

(2) The deposit made by the defendant bank on April 1, 1920, in the Circuit Court of Vienna under the Austrian law was a deposit of the entire amount of its debt to the plaintiffs, and discharged the defendant bank from further liability.

(3) The provisions of the Treaty of St. Germain-en-Laye, Articles 248 and 249, relating to the rateof exchange to be applied in settlement of prewar debts between Austrian and American nationals do not apply to this case, A—because the provisions in question do not apply to a suit under Section 9 of the Trading with the Enemy Act to establish a kronen debt owing from an Austrian bank, payable in kronen on demand in Austria, and B—because the deposit referred to in the defendant bank's second contention was made prior to the time when the treaty came into force.

(4) If the court deposit made by defendant bank on April 1, 1920, should be found ineffective as a

discharge, the plaintiffs are entitled to recover their prewar kronen balance, without interest until April 1, 1920, but with 2½ per cent. interest thereafter, at the judgment day rate only, because, A—This case is governed by the rule in *Humphrey's* case; B—No account was stated; C—The debt, being a bank balance, could be matured only by a demand, and a demand has not been made; and D—The outbreak of the war did not mature the debt.

(5) The equities are not fairly stated in Point VI of the plaintiffs' brief.

We subjoin here a chronological summary of events referred to in this, as well as in the plaintiffs', brief for convenient reference:

Apr. 6, 1917—War declared between the United States and Germany;

Oct. 6, 1917—Trading with the Enemy Act approved;

Dec. 7, 1917—The United States declares war on Austria;

Nov. 3, 1918—Armistice signed between the American and the Austrian forces;

Nov. 11, 1918—Armistice signed between American and German forces;

July 14, 1919—General trade and commercial communication restored between the United States and Austria;

Sept. 10, 1919—The Treaty of St. Germain-en-Laye signed by the plenipotentiaries of the various signatory powers;

Apr. 1, 1920—Defendant bank deposited plaintiffs' kronen balance pursuant to Section 1425 of the General Civil Law Code of Austria;

July 16, 1920—The treaty came into force pursuant to Article 381 thereof, except as to the United States of America;

July 2, 1921—Congress passed the joint resolution terminating the state of war between the United States and Austria;

Aug. 24, 1921—The treaty of peace between the United States and Austria, known as the "Treaty of Vienna," signed;

Nov. 8, 1921—The Treaty of Vienna ratified;

Nov. 26, 1924—Agreement made between the United States and Austria establishing the Tripartite Claims Commission for the determination of claims between American nationals and Austrian and Hungarian nations;

Dec. 12, 1925—The agreement for the Tripartite Claims Commission ratified at Washington, D. C.

POINT I.

Austrian law is the law by which the mutual rights and obligations of the plaintiffs and the defendant bank must be measured in this suit.

The defendant bank was a foreign corporation doing business in Vienna, Austria, under a charter granted to it by the old Austro-Hungarian Government, and validated by its successor, the present Austrian Republic (R. 35, fol. 105). The defendant bank had no branch office in the United States (R. 36, fol. 106).

There is no evidence showing where the original agreement between the parties was made. But the evidence shows unquestionably where the agreement was to be per-

formed. The stipulation of fact made between the parties is as follows (R. 36, fol. 106):

> "For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs, from time to time, made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant bank, Wiener Bank Verein, at Vienna."

The Supreme Court of the United States, in the case of *Humphrey* v. *Deutsche Bank* (No. 224, October Term, 1926, decided November 23, 1926), considered a relation identical with the relation between the plaintiffs and defendant bank as disclosed in the stipulation quoted.

Humphrey was an American citizen and a resident of the State of California. Prior to 1915 he had established a number of deposits with a branch of the Deutsche Bank located at Nurnberg, Germany. In June, 1915, Humphrey called at the Deutsche Bank's office and banking house at Nurnberg and demanded his money. Owing to war regulations the bank declined to comply with the demand. Humphrey began suit in July, 1921, under the Trading with the Enemy Act. The courts below held that his German mark deposit should be translated into dollars at the rate of exchange existing when the demand was made. The Supreme Court reversed the courts below, saying:

> "In this case, unlike *Hicks* v. *Guinness*, 296 U. S. 71, at the date of the demand the German bank owed no duty to the plaintiff under our Law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German Law might impose. It has

incurred no additional or other one since. The suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. *Davis* v. *Mills*, 194 U. S. 451. See *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542."

Apparently, the court was of the opinion that, aside from any express agreement between the parties (none was proved at the trial), the nature of the transaction determined its status as a German debt governed by German Law.

The rule laid down in the *Humphrey* case is the latest authoritative expression of a doctrine supported by a formidable array of judicial authority and by our most distinguished text writers.

Andrews v. *Pond*, 13 Peters 65.
Hall v. *Cordell*, 142 U. S. 116.
Pritchard v. *Norton*, 106 U. S. 124.
Union National v. *Chapman*, 169 U. S. 538.
London Assurance v. *Companhia de Moagens*, 167 U. S. 149.
Canada Southern Railroad Co. v. *Gebhardt*, 109 U. S. 527.
Relfe v. *Rundle*, 103 U. S. 222.
Stockwell v. *Supreme Court, Independent Order of Foresters*, 216 Fed. 205.
Dickinson v. *Edwards*, 77 N. Y. 573.
Old Dominion Copper etc. v. *Bigelow*, 203 Mass. 159.
Benedict v. *Dakin*, 243 Ill. 384.
Douglas v. *Paine*, 141 Mich. 485.
Chatenay v. *Brazilian etc.* (1891), 1 Q. B. 79.
Story, Conflict of Laws (8th Ed.), Sec. 280, p. 376.

Beach on Contracts, Secs. 592, 606.
Dicey, Conflict of Laws (3rd Ed.), 609, 610.
13 *Corpus Juris*, 249.

Plaintiffs' counsel, however, argue strenuously that the contract in the instant case is not governed by Austrian law. Under the circumstances, although it may be superfluous, it will do no harm, we think, to document the holding of the *Humphrey* case by the authorities cited in the discussion which follows.

The general rule as to the law of the contract is stated in 13 *Corpus Juris* 249, as follows:

> "When the contract is made in one country and is to be performed either wholly or partly in another, the proper law of the contract especially as to the mode of performance may be presumed to be the law of the country where performance is to take place, the lex loci solutionis."

In the case of *Benedict* v. *Dakin, supra,* the court, at page 387, says:

> "The general rule is that the place where a contract is made must govern the performance of its terms and conditions; but when it is the express intention of the parties that the contract is to be performed at a different place and under a different jurisdiction from the place where it is made, then the law of the place of performance must govern."

In the case of *Old Dominion Copper Co. etc.* v. *Bigelow, supra,* the court stated the rule as follows:

> "Where a contract is made with a purpose by the parties to it that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law,"

citing among many other cases, the *Pritchard* v. *Norton* and the *Hall* v. *Cordell* cases in the Supreme Court of the United States.

In the English case of *Chatenay* v. *Brazilian, etc., supra,* the court held:

> "The business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Therefore the law has said that if the contract is to be carried out in whole in another country, it is to be carried out according to the law of that country * * *."

In the case of *Dickinson* v. *Edwards,* 77 N. Y. 573, the rule is stated as follows (bottom of p. 576):

> "This Court conceded that the law is that a contract is to be governed by the law of the place where it is made, if it is not by its terms to be performed elsewhere; *but held that if by its terms it is to be performed in a State other than that in which it was made the law of the State in which it is by its terms to be performed, must govern.*" (Italics ours.)

In the case of *Douglas* v. *Paine,* 141 Mich. 485, the court stated the rule by quoting with approval *Beach on Contracts,* Sections 592 and 606, as follows:

> "If by the terms or nature of the contract, it appears that it was to be executed in another country, then the place of making the contract becomes immaterial and the law of the place where the contract is to be performed governs in determining the rights of the parties. If a contract is made in one State or country and it is to be performed in another, it

> will be presumed that it was entered into with reference to the laws of the latter and those laws will be resorted to in ascertaining the validity of the contract."

This law governs not only as to the execution, authentication and construction of a contract, but also as to the legal obligations arising from it and as to what is to be deemed a performance, satisfaction or discharge.

Judge Story, in his *Conflict of Laws,* Section 280, page 376, 8th Edition, says:

> "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its *validity, nature, obligation, and interpretation* is to be governed by the law of the place of performance. This would seem to be a result of natural justice" (citing *Andrews* v. *Pond,* 13 Peters 65).

Chief Justice Taney, who wrote the opinion in the *Andrews* case, says on page 77:

> "The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance—and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In the case of *London Assurance* v. *Companhia de Moagens,* 167 U. S. 149, Peckham, J., at page 160 says:

> "Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

Mr. Dicey, in his book, *Conflict of Laws,* 3rd Edition (1922), 609, 610, says:

> "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, *especially as to the mode of performance,* may be presumed to be the law of the country where the performance is to take place." (Italics ours.)

This contention is given especial force in this case by the manner in which the plaintiffs and the defendant bank interpreted the contract. It is admitted by the stipulation that (R. 36, fol. 107):

> "During the period that the plaintiffs maintained the bank account with the defendant, the Wiener Bank Verein, the latter sent to the plaintiffs and the plaintiffs received periodic and regular statements of account at least once in three months, such statements of account being rendered on a printed sheet identical with the facsimile annexed to this stipulation and marked Exhibit A, with the exception of the blanks shown on the said facsimile, which blanks were filled out in each statement of account in accordance with the facts shown on such statement."

On the first page of those printed provisions, immediately preceding the signature of the defendant bank, appears this statement:

> "At the same time we beg to request you to take notice of the general conditions and terms for deposits and account current which appear within."

Among the conditions referred to in this last quotation is the following:

> "*The relations existing between us and our business friends will in general be governed by the laws in force in Austria.* So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be." (Italics ours.)

There is no evidence that that condition as set forth in paragraph 11 was not entirely in harmony with the original agreement between the parties. The fact that at least once in three months a statement of account was rendered in which the plaintiffs' attention was called to that condition and that the plaintiffs at no time took exception to it, should conclude the plaintiffs and estop them from denying that they dealt with the defendant bank subject to that condition.

Furthermore, the defendant was a foreign corporation. The stipulation is to the effect that:

> "The defendant, Wiener Bank Verein, is a foreign corporation engaged in the business of banking. It was organized under the laws of the Empire of Austria-Hungary, and received its corporate charter from the duly constituted Governmental Department under that Empire empowered to issue the same. It has continued its corporate existence unchanged during the changes in the Government of Austria occurring during and after the war and its charter has been continued and validated by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States of America."

one who contracts or deals with a foreign corporation reasonably assumes that his contract and his dealings should be subject to the laws of the domicile of the foreign corporation.

The leading case in the Federal jurisdiction on this point is the case of *Cicanda Southern Railroad Co. v. Gebhardt*, 109 U. S. 527. A condensed statement of the facts in that case may not be out of place here.

The *Cicanda Southern Railroad Company*, a corporation organized under the laws of the Government of the Dominion of Canada, floated a bond issue for some $5,000,000 secured by a trust mortgage on its property. It was unable to meet the interest charges. An additional bond issue for some $2,000,000 was floated, also secured by a trust mortgage. But its embarrassment was not relieved. A new bond issue of $14,000,000 was floated at a lower rate of interest than the preceding issues and an offer made to the earlier bondholders to exchange their holdings, dollar for dollar, for the new bonds. Under this plan the original trust mortgages were to be discharged and the last bond issue secured by a first trust mortgage on the railroads' property.

Over two-thirds of the bondholders consented to the exchange. The rest refused.

The railroad applied to the Canadian Parliament for a special act to approve the new bond issue, discharge the earlier mortgages and substitute the last trust mortgage, declaring it to be a first mortgage on the railroad's property.

Under the laws of the Dominion of Canada it was competent for its Parliament to pass such an act. The act was passed. It provided, among other things, that all of the earlier bondholders shall be "deemed" to have consented to the exchange of their bonds at par for the new bonds at par, although the new bonds carried a lower rate

of interest and the new mortgage secured almost twice the amount of the original mortgage, thus diminishing the security for the bond issue practically by half.

A group of New York bondholders began a suit against the railroad. They were represented by the late Mr. Joseph H. Choate. The case reached the Supreme Court of the United States, which, in its opinion sustaining the railroad, said as follows (p. 537):

> "Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government * * * as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of a foreign government, *and whatever is done by that government in furtherance of that policy which binds those in like situation with himself who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.* He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them and it has no power to contract with a view to any other law with which they are not in entire harmony." (Italics ours.)

In the case of *Stockwell* v. *Supreme Court, etc.*, 216 Fed. 205, a Canadian fraternal society entered into a contract *in New York* with a member. The certificate of membership which constituted the contract between the society and the member stipulated that the monthly payments would not be increased while he remained in good standing.

Thereafter, when it appeared that a shortage of funds applicable to the payment of claims of members of a certain "time class" known as "the pre-ninety-nines" was

imminent, an amendment of the society's charter was secured by an act of the Dominion Parliament, as a result of which an assessment of $240 per $1,000 was levied on the certificate held by the member, and was declared to be a lien thereon.

In an action by the beneficiary of the member, the Court held, after a very exhaustive and careful opinion, that the contract was subject to the laws of Canada and allowed the lien.

The plaintiffs' counsel assert that, even if the parties had contracted to be governed by Austrian law, the outbreak of the war dissolved the contract, thereby discharging the rights of the parties from the application of the Austrian law. The statement is pure dogma. No attempt is made to support it, either by argument or by authority. But, assuming, though not granting, that the contract between the plaintiffs and the defendant bank was dissolved or terminated by the war, by what mystic legal alchemy was a duty to pay kronen in Vienna transmuted into a duty to pay dollars in New York? Let us grant for the moment that the plaintiffs contemplated that they will be able effectively to dispose of their kronen in Vienna in accordance with their original intention. What if they did? They nonetheless remained bound by the principle stated in the *Canada Southern Railroad* case, that:

> "Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government * * * as the known and established policy of that government authorizes."

POINT II.

The deposit made by the defendant bank on April 1, 1920, was a deposit of the entire amount of its debt to the plaintiffs, and discharged the defendant bank from further liability.

By contract between the parties, their relations were to be governed by Austrian law (R. 42, fol. 126).

If there had been no express agreement, the Austrian law would govern by virtue of principles of law long established here, as already shown.

Defendant bank was an Austrian banking corporation located in Vienna. Of necessity, it existed and did business in accordance with Austrian laws. It could not do otherwise.

Its contract with the plaintiffs was a very simple one—the ordinary contract between bank and depositor. Its only obligation was to hold plaintiffs' funds when deposited and pay them out when demanded, allowing interest in the meantime at 2½ per cent. Vienna was the place of payment (R. 43, fol. 127). The currency deposited was Austrian kronen. The only place of performance was Austria. That, inferentially, is also the place where the contract was made. There is no evidence that it was made anywhere else.

The plaintiffs opened their account with defendant bank a number of years before the war (R. 36, fol. 106). During the period of the account and for a long time before there was in force in Austria Section 1425 of the General Civil Law Code of that country. It provided as follows (R. 36, fol. 108; R. 37, fol. 109):

> "If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor

may deposit in court the subject matter in dispute; or, if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor."

The statute quoted is not against our public policy; it is not opposed to any American statute; it is not a war measure; it is not discriminatory, since it applies to Austrians and Americans alike; it is reasonable; and, finally, it has its analogue in every civilized jurisdiction, including our own. For it is nothing more than a law permitting a debtor to make a tender of his debt.

Communication and commercial relations between the United States and Austria were restored on July 14, 1919.

After that date the defendant bank offered to pay the plaintiffs the amount of kronen on deposit, either in kind or in United States dollars, at the then existing rate of exchange (R. 37, fol. 110). A bank has always the legal right to wind up or discontinue a depositor's account. In this case the defendant bank had that right also by contract (R. 40, fol. 119).

The plaintiffs refused the offer and demanded payment in United States dollars at the pre-war rate of exchange (R. 37, fols. 110, 111). The rate of exchange between kronen and dollars had greatly depreciated.

It will thus be seen that at least two of the reasons specified in the statute for making the deposit in court were present, namely, the creditor was absent and was dissatisfied with the offer.

Thereupon, on April 1, 1920, defendant bank deposited the entire amount of plaintiffs' balance, with accrued interest at 2½ per cent. per annum (the rate agreed upon), in the Circuit Court for the Interior at Vienna, in ac-

cordance with the Austrian statute above quoted (R. 37, fols. 111, 112; R. 47, fol. 141), and gave due notice thereof to plaintiffs by cable and mail (R. 111, fols. 332, 333).

The Circuit Court of the Interior at Vienna was the proper court in which to make such deposits (R. 38, fol. 112).

This court deposit, it is submitted, constituted a complete discharge of the defendant bank's liability on the debt in question.

Ford v. *Surget*, 97 U. S. 594.
In re Ling & Duhr (1918), 2 Chancery 298.

In the case of *Ford* v. *Surget* the plaintiff sought to recover from the defendant the value of 200 bales of cotton, amounting to $120,000, which the defendant had destroyed. The defendant admitted the act, but asserted in defense that it was done in accordance with the rules of the Confederate authorities, which at the time were in occupation of the plantation in Mississippi, where the cotton was stored. The court held that since the Civil War, under the Supreme Court's previous rulings, was a war between nations, the general rules of war between belligerents would apply, so that the defendant having burned the cotton in conformity with the law of the *de facto* government of the territory was not liable.

In the case of *Ling & Duhr* the facts were these:

The funds of Ling & Duhr, enemies, had been sequestered by the British Custodian. A creditor filed a claim against that fund, claiming the amount to be due for goods sold and delivered prior to the war. The claim had been allowed by the Registrar, to whom, under the English practice, it first had to be submitted, and the Custodian brought suit to vary the Registrar's ruling in allowing the claim.

The sum for which the suit was brought was payable in marks at a bank in Crefeld, Germany. In disallowing the claim, Younger, J., after conjecturing that the debt may have been paid into the Reichsbank or some custodian under emergency legislation, continued:

> "Although it is no part of my present duty to state what, for all purposes, would be the effect of such payment, it is sufficient to say that the payments made in Germany by the enemy in question to the Reichsbank or to such other Custodian or authority as may be prescribed by German law to receive them, would be sufficient to justify the Court under this jurisdiction in refusing to direct payment out of the funds in the hands of the Custodian to a creditor whose claim had been so satisfied, *and particularly in a case like the present where the contract in respect of which the creditor claims was one made in Germany to be performed in Germany and altogether subject in its incidents and rights to German law.*" (Italics ours.)

It will be noted that in the two cases just cited the statutes relied on by the defendants were in the nature of emergency war legislation. *A fortiori* the rule would apply to the case at bar, where the statute relied on has been a law of the land for many years, applying to natives and foreigners alike, and was in no sense emergency war legislation.

The defendant bank was entitled to avail itself during the war of the provisions of law in force in Austria. The United States Supreme Court so held in the case of *Masterson* v. *Howard*, 85 U. S. 99, where it said:

> "The existence of war does indeed close the courts of each belligerent to the citizens of the other, *but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property, in their own courts, against the citizens of the other.*" (Italics ours.)

To the same effect, see *Dorsey* v. *Kyle*, 96 American Decisions 621 (30 Md. 512).

The plaintiffs say (p. 95 of their brief):

> "Even if the Austrian law pleaded by the defendant bank, might be considered in ordinary circumstances to discharge that bank of any liability beyond the subject matter of the deposit, we insist that it cannot have such an effect here, because to do so would clearly render nugatory the provisions of the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, which became the law of Austria, as well as of the United States, and superseded any National law inconsistent therewith."

They cite, in support of this statement, the case of *Ware* v. *Hylton*, 3 Dall. 199.

During the Revolutionary War, debts owing to British creditors had been paid by the American debtors into loan offices, "in paper money, of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money and discharging the debtors" (*Ware* v. *Hylton*, 3 Dall. 199, at p. 238).

The Statute of Virginia, passed on October 20, 1777, was one of such laws. The court, in a very elaborate opinion written by Mr. Justice Chase, held that deposits made under that statute of Virginia did not discharge the debts.

An examination of the opinion of Mr. Justice Chase discloses that his ruling was based upon the specific point that *under the terms of the Jay Treaty*, by which the Revolutionary War was terminated (United States and Great Britain, September 3, 1783, 18 Stat. L., Part 2, p. 269), *the courts of the United States and of the several states had no power to hear defenses based on emergency statutes* such as the Virginia statute.

The Jay Treaty contained a specific provision to that effect.

The fourth article of the Treaty provided:

> "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted."

Mr. Justice Chase held that "lawful impediments" meant impediments which *could be interposed in a court of law,* and that the *only impediments which could be interposed in a court of law were defenses;* that it was competent for the United States and England to agree that creditors on either side shall meet with no such "lawful impediments." He did not hold that a treaty has retroactive force or that it can operate on something which was not in existence when the treaty came into power.

The provisions of the fourth article of the Jay Treaty might be likened to statutes under which certain kinds of evidence or evidence of certain facts is made incompetent. Thus, oral evidence of a contract for the sale of land is incompetent by statute; so is testimony in an action by or against an executor as to transactions between the deceased and a witness interested in the event. The fourth article was held by Mr. Justice Chase merely to render incompetent any proof of the emergency statute upon which the defendants relied and which in the absence of the treaty would have constituted a good defense. He says at page 244:

> "I consider the fourth article in this light; that it is an express agreement that certain things shall not be permitted in the American Courts of Justice and that it is a contract on behalf of those courts that they will not allow such facts to be pleaded in bar to prevent a recovery of certain debts."

We submit that the learned counsel for the plaintiffs failed to quote the most apposite portions of Mr. Justice Chase's long and scholarly opinion. If Mr. Justice Chase is an authority at all, the deposit made by the defendant bank was a complete discharge of the debt, unless prevented by some provision in the Treaty of Vienna, for he says at page 234:

> *"But the debt was extinguished as between the creditor and the debtor. The debt was legally paid and of consequence extinguished. The State interfered and received the debt and discharged the debtor from his creditor. If Virginia had confiscated British debts and received the debt in question and said nothing more, the debtor would have been discharged by operation of law.* In the present case there is an express discharge on payment, certificate and receipt." (Italics ours.)

And again (at p. 240):

> *"If the recovery of the present debt is not within the clear and manifest intention and letter of the fourth article of the Treaty and if it was not intended by it to annul the law of Virginia mentioned in the plea and to destroy the payment under it and to revive the right of the creditor against his original debtor * * * I think the court ought to determine in favor of the defendants in error."* (Italics ours.)

Mr. Justice Chase went much further than the defendant bank asks this Court to go. The legislation involved there was a statute passed *subsequent to the accrual of the debt,* and was in its nature confiscatory. Furthermore, the statute was *directed only against British subjects.*

The statute relied on by the defendant bank is a statute which was in force for a hundred years before the contract was made; is not confiscatory; is general in its terms, and *applies to an Austrian as well as to an American creditor.*

The Treaty of St. Germain, as well as the Treaty of Vienna, will be searched in vain for any provision resembling, even remotely, the fourth article of the Jay Treaty; so that under the rule as laid down in *Haver* v. *Yaker*, 76 U. S. 32, these treaties do not apply.

As to the case of *Wolff* v. *Oxholm*, 6 M. & S. 92, cited on page 97 of plaintiffs' brief, it is sufficient to observe, first that the case involves a confiscatory statute and is therefore not in point, and second, that our own Courts have held directly to the contrary in the cases of *Ware* v. *Hylton* (*supra*) and in the case of *Ford* v. *Surget*, 97 U. S. 594, cited above.

On page 94 of their brief, the plaintiffs' counsel argue:

> "In providing through the Trading with the Enemy Act for the taking over of property of 'enemies' and 'allies of enemy,' and, as a practical matter, thus depriving American citizens of their franchise through attachment or satisfaction of judgment, Congress within its power and authority as defined by the Constitution, provided for the recovery by American citizens, from property seized by the Alien Property Custodian, of claims which such citizens might have against 'enemy' and 'ally of enemy' subjects."

With reservations as regards the connotation of the word "claims," this may be granted.

But we cannot grant the contention which is repeated at the bottom of the same page, "That the kronen here owed are payable at a pre-war rate of exchange under the Trading with the Enemy Act whether or not they were due." This Court has already held to the contrary in the *Humphrey* case (*Die Deutsche Bank Filiale Nurmberg* v. *Humphrey*, No. 224 Oct. Term, 1926), where it said of

a bank deposit in marks in a German bank payable on demand in Germany:

> "On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things * * *. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it."

The Humphrey case, it should be remembered, was a suit under Section 9 of the Trading with the Enemy Act to establish a foreign bank debt—precisely the case here.

In conclusion, we wish to remark once more that in their petition for appeal to this Court (R. 132, 133) supported by their assignments of error (R. 134, 135) the plaintiffs do not complain of, or assign any alleged error committed by the Circuit Court of Appeals in holding that the Court deposit made by the defendant bank on April 1, 1920, constituted a discharge of its debt; and that the plaintiffs are therefore not entitled to a review by this Court of the alleged error.

POINT III.

The provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye (United States Treaties and Conventions, Vol. 3, p. 3149) relating to the rate of exchange to be applied in settlements of pre-war debts between Austrian and American nationals do not apply to this case, A—because the provisions in question do not apply to a suit under Section 9 of the Trading with the Enemy Act, to establish a kronen debt owing from an Austrian bank, payable in kronen, on demand, in Austria, and B—because the defendant bank made its court deposit under Austrian law before the Treaty came into force.

A.

The conversion of the currency of one country into the currency of another, at the pre-war cable transfer rate of exchange, under the provisions of Articles 296 and 297 of the Treaty of Versailles, and Articles 248 and 249 of the Treaty of St. Germain-en-Laye, has been described by French and German writers on the subject and by many of the mixed arbitral tribunals as "valorization." That noun and the verb derived from it, "to valorize," will be used in this discussion in order to avoid awkward locutions.

For a proper understanding of the subject, it is necessary to examine with care the provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye, together with their respective Annexes, and to note the relative positions occupied by the respective Articles in the complete structure of the plan devised by the Treaty for the settlement of pre-war debts and claims for damages between the Governments signatory to the Treaty. The complete

text of Article 248, with its Annex of twenty-five paragraphs, and Article 249, with its Annex of fifteen paragraphs, is set out in full at the end of this brief.

A digest of the Articles in question and of the important passages in their respective Annexes follows:

Article 248 (Section III).

The Article is entitled "Debts" and provides that

> "there shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties, * * * *the following classes of pecuniary obligations.*"
>
> 1. Debts payable before the war.
>
> 2. Debts which became payable during the war arising out of transactions or contracts between opposing nationals where the total or partial execution thereof was suspended by the war.
>
> 3. Interest which had become due before the war as well as interest which became due during the war, provided it was not suspended by the war.
>
> 4. Capital sums which became payable before or during the war on government securities, provided payment was not suspended during the war.

The last sentence of this paragraph provides that

> "The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV (Article 249) and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (d), and disposed of by them under the conditions provided by the said Section and Annex."

This enumeration (in which the numbering of the subparagraphs of the Article is retained) comprises the vari-

ous categories of *debts* with which alone this Article is concerned.

The rest of the Article and its Annex is devoted to a description of the mechanism of the Clearing Offices (see page 95 of this brief).

Certain aspects of that mechanism are of great importance.

We quote:

> (a) "Each of the High Contracting Parties shall prohibit as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing office."
>
> Paragraph 3 of the Annex: "The High Contracting Parties will subject contraventions of paragraph (a) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex."
>
> (d) "Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates or the British Dominions or India, as may be concerned. If the debts are payable in some other currency, they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, colony, protectorate, British Dominion or India, at the pre-war rate of exchange.
>
> *For the purpose of this provision* the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said

country concerned and Austria-Hungary. (Italics ours.)

If a contract provides for a fixed rate of exchange concerning the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not be applied."

(The last sentence of this sub-paragraph refers to new States and, being of no importance in this discussion, is omitted.)

Subdivision (e): "The provisions of this Article and of the Annex hereto shall not apply as between Austria on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period of one month from the deposit of the ratification on behalf of such Dominion or of India, notice to that effect is given to Austria by the Government of such Allied or Associated Power or of such Dominions or of India, as the case may be."

We wish to call special attention to 248 (a) and to Annex 3. Obviously, the framers of the Treaty thought it important to make the Clearing Office the sole and exclusive channel through which settlement funds should be permitted to flow.

We may now summarize and restate the provisions of Article 248 and its Annex as follows:

The United States may at its option (to be expressed by a notice to Austria to that effect given within thirty days) adopt the mechanism of the Clearing Offices for the adjustment of reciprocal claims between its nationals and the nationals of Austria, *consisting of debts, interest and capital sums.* If the option is exercised by the United States, and the "pecuniary obligations" between the two

countries and their respective nationals come to be settled through the intervention of Clearing Offices to be established by the High Contracting Parties, valorization shall apply, not otherwise. Note the wording of the second sentence of paragraph 248 (d):

> "*For the purpose of this provision* the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing, etc."

To prevent interference with the orderly discharge of the functions of the Clearing Offices,

> "each of the High Contracting Parties shall prohibit * * * both the payment and the acceptance of payment of such debts * * * otherwise than through the Clearing Offices."

Severe punishment shall be visited on persons attempting to settle their debts privately.

It is clear that if the United States had exercised its option and adopted Section III, Article 248, the plaintiffs could not maintain this suit at all. Possibly bringing the suit would have been a felony (par. 3 of the Annex to Art. 248; Sec. 16 of the Trading with the Enemy Act).

It is well known, however, that the United States did not adopt Section III (because it did not wish to become primarily liable for claims of Austrians against Americans—see note *) so that at least so far as this Section is

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* Note:—Mr. Baruch, in his book, "The Making of the Reparation and Economic Sections of the Treaties," at page 102, tells us that it was at the instance of the United States that clause 248(e) (the thirty-day notice clause) was inserted in order to permit the United States to remain out of the Clearing Office system which its representatives did not favor:

> "The Clearing House plan may be desirable and necessary for some of the Allied countries, but it was considered by the American representatives at Paris, that it might be undesirable, if not impossible, for the United States. For that reason they took steps to have the adoption of the scheme made optional."

concerned, there are no valorization provisions which the plaintiffs can invoke here.

ARTICLE 249 (SECTION IV).

This Article is entitled "Property, rights and interests." It directs that

> "The question of private property rights and interests in an enemy country shall be settled according to the principles laid down in this Section (Section IV) and to the provisions of the Annex hereto,"

and provides that

(a) All exceptional war measures and measures of transfer taken by Austria, if liquidation thereunder has not been completed, shall be immediately discontinued.

(b) The right is reserved to the United States to retain and liquidate all enemy property in its control. This liquidation is to be carried out according to the laws of the United States, and the owner shall have no right to dispose of the property under liquidation without the consent of the United States.

(c) Enemies whose property shall have been liquidated by the United States shall be entitled to its value fixed by methods prescribed by the laws of the United States.

(d) Except as to reservations laid down in the Treaty, all vesting measures taken or to be taken by either of the High Contracting Parties, in pursuance of exceptional war measures or measures of transfer, are confirmed.

(e) United States nationals shall be entitled to *compensation in respect of damage or injury* inflicted upon their property, rights and interests through the application of exceptional war measures or measures of transfer by Austria. *This compensation shall be borne by Austria* and *may* be charged upon property of Austrian nationals

under the control of the United States. The property *may* be constituted as a pledge for enemy liabilities under paragraph 4 of the annex (see *infra*).

(f) Where restitution in specie is possible, it shall be made *by Austria*. Where it is impossible, private agreements may be made *by the intermediation of the Powers or Clearing Offices*, to the end that the United States nationals may receive satisfactory equivalents for the property of which he was deprived.

(g) The rights under (f) are reserved to nationals of those Allied and Associated Powers who did not apply measures of transfer before the Armistice.

(h) Except in cases where restitution in specie has been made by Austria, the net proceeds of the sale of enemy property and in general all cash assets of enemies, shall be dealt with as follows:

Subparagraph 1. As regards Powers adopting Section III (this of course excludes the United States), the proceeds shall be credited through the Clearing Office to the power of which the owner is a national, any credit balance in favor of Austria to be dealt with in accordance with the Reparations provisions of the Treaty (Art. 189, Part VIII).

Subparagraph 2. As regards the United States, such proceeds and cash assets held by Austria shall be paid immediately to the owner or to his Government. But proceeds of liquidation and cash assets held by the United States shall be subject to disposal in accordance with the laws of the United States and *may* be applied in payment of the claims and debts defined in paragraph 4 of the Annex (see *infra*). Any balance remaining shall be dealt with in accordance with the Reparations provisions.

(i) (This refers to liquidation effected in new States and is of no importance here.)

(j) Austria agrees to compensate its own nationals for their property applied by the United States, pursuant to te foregoing provisions.

(k) All capital taxes levied by Austria on property of United States nationals after November 3, 1918 (the date of the Armistice), shall be restored to the owners.

Paragraph 4 of the Annex, which is referred to in subparagraph (h)2 of the Article, reads as follows:

> "All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith, may be charged by that Allied or Associated Power in the first place, with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian government or by any Austrian authorities since July 28th, 1914 (the date of the declaration of war by Austria against Serbia), and before that Allied or Associated Power entered into the war. *The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI.* They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy

Powers, in so far as those claims are otherwise unsatisfied." (Italics ours.)

We may now summarize and restate the substance of this Article:

All completed liquidations pursuant to the application of exceptional war measures or measures of transfer are confirmed by both Governments. Austria agrees to discontinue immediately all exceptional war measures or measures of transfer where liquidation has not been completed and to return the property to the owner. The United States is given the right to retain and liquidate all property rights and interests which have come under its control and may do so in accordance with its own laws.

The Austrian Government agrees to compensate American nationals in respect of *damage or injury* inflicted upon their property rights or interests, and the United States may retain all property it has seized from Austrian nationals as security for this engagement to pay, undertaken by Austria. Wherever possible, restitution in specie must be made and where such restitution in specie cannot be made, an agreement arranged through the Powers or Clearing Offices (not between the individual parties) should be reached in order to make the United States national whole by the grant of advantages or equivalents which will be satisfactory to him.

Except where restitutions in specie have been made, the net proceeds of enemy property, rights and interest shall be credited to the Power of which the owner is a national, in cases where the Clearing Office system was adopted; but between Austria and the United States, *the Austrian Government shall pay* the net proceeds and cash assets in its possession belonging to an American national, directly to him or to the United States (for the owners behalf presumably), and the United States shall dispose of any net

proceeds or cash assets in its possession belonging to an Austrian national in accordance with its laws, and *may* apply them in payment of claims and debts defined in Article 249 or in paragraph 4 of the Annex.

The sentence in paragraph 249 (h)2 providing that the United States may use the net proceeds and cash assets of an Austrian national at its disposal

> "in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto,"

must be read in connection with the sentence in paragraph 249 (e) which says of these net proceeds and cash assets held by the United States that

> "This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto."

The two sentences read together, in the light of paragraph 4 of the Annex to which both refer, unmistakably indicate the intention that the net proceeds of enemy property and cash assets held by the United States *may be constituted as a pledge or as security for the payment by Austria of the claims of American nationals against the Austrian Government and against Austrian nationals.*

An examination of these two Articles and their respective Annexes definitely establishes that Article 248 is confined solely to adjustments and payment, through Clearing Offices to be established, of reciprocal classes of "pecuniary obligations," to wit, debts, interest and capital sums, *which had not been subjected to exceptional war measures or measures of transfer,* while Article 249 is confined to the treatment of *claims for damage and injury* resulting through the application of war measures and measures of transfer.

That Article 248 did not intend to deal with proceeds of liquidation, is clear from the last sentence of paragraph 4 of that Article, which provides:

> "*The proceeds of liquidation of enemy property rights and interests mentioned in Section IV and in the Annex thereto* will be accounted for through the Clearing Offices in the currency and at the rate of exchange hereinafter provided in paragraph (d) and disposed of by them under the conditions provided by the said Section and Annex." (Italics ours.)

Furthermore, it appears from the same sentence that it was the understanding of the framers of the Treaty that Section IV, Article 249, was concerned with "proceeds of liquidation of enemy property, rights and interests," as distinguished from debts.

As already pointed out, it is clear that debts, *as such,* will not be valorized in virtue of Article 248, since, concededly, the thirty-day notice required to make the Article effective was not given.

It is equally clear that a *debt, as such,* will not be valorized in virtue of the provisions of Article 249 *unless its character as a debt has been changed, by the application of exceptional war measures or measures of transfer by Austria,* into a claim for net proceeds of property, rights and interests. The application of such measures would automatically remove the debt from the purview of Article 248 and place it within the purview of Article 249. This view is confirmed by the first sentence of paragraph 14 of the Annex to Article 249, which reads:

> "The provisions of Article 249 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, *apply to debts, credits and accounts,* Section III regulating only the method of payment." (Italics ours.)

In other words, if bank deposits had been sequestered by Austria or any measure within the definition of paragraph 3 of the Annex to Article 249 had been applied against it, the American creditor would be entitled to all the rights granted to one having a claim for damage and injury to property, rights and interests under Article 249.

The plaintiffs base their claim for the valorization of their debt upon the language of the second sentence of paragraph 14 of the Annex to Article 249. This sentence reads as follows (we omit the irrelevant phrases and substitute "United States" for "the Allied or Associated Powers"):

> "In the settlement of matters provided for in Article 249 between Austria and the United States * * * in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the United States shall within six months of the coming into force of the present Treaty, notify Austria that one or more of the said provisions are not to be applied."

Because, concededly, the notice was not given by the United States, the plaintiffs insist that their *debt, as such,* must, in virtue of this sentence, be valorized, although no war measures whatever have been applied to it by Austria.

That this argument is unsound will readily appear from the following considerations.

It will be noted that the valorization and interest provisions of Article 248 are made applicable to Article 249 *only in the settlement of matters provided for in Article 249:* "In the settlement of matters provided for in Article 249 between Austria and the United States" the valorization provisions of Section III shall apply, unless notice

is given by the United States, within six months, to the contrary.

But we have just seen that the "matters provided for in Article 249" do not include the settlement of *debts, as such,* between the nationals of one of the countries and the nationals of the other. True, "debts, credits and accounts" are to be considered as property under the first sentence of paragraph 14 of the Annex. But that means simply, as we have already pointed out, that if war measures have been applied against any debts, credits or accounts, the owners thereof become entitled thereby to compensation for any damage and injury which they have suffered as a result. It can mean nothing else.

The importance of the third sentence in paragraph 4 of Article 248, as a point of articulation between Articles 248 and 249, now fully appears. We again quote it:

> "The proceeds of liquidation of enemy property, rights and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices in the currency and at the rate of exchange hereinafter provided in paragraph (d) and disposed of by them under the conditions provided by the said Section and Annex."

It clearly points out that Article 249 treats of *liquidations,* i. e., proceeds from the application of war measures, *as distinguished from* debts, credits and accounts which form the subject-matter of Article 248. At the same time it links up the valorization provisions of Article 248 (d) with Article 249, by making those provisions applicable to claims for compensation for damage and injury. *Such a linking up was necessary, for, otherwise, damage or injury claims of nationals of clearing States might have lost the benefits of valorization.*

On the other hand, it was necessary to link the valorization provisions of Article 248, in some manner, with the provisions of Article 249, *in order to reserve to non-clearing Powers the right to valorization of claims for damage and injury.* Instead of repeating the valorization provisions of Article 248 in full, which, indeed, it might have done, the Article merely states that "in the settlement of matters provided for in Article 249," that is to say, *in claims for compensation because of damage or injury*, the valorization provisions of Article 248 shall apply. In order to apply valorization to *debts, as such*, it is therefore necessary in some manner to link up debts with "matters provided for in Article 249," *in the settlement of which, alone*, those provisions apply. The extended argument of the plaintiffs' counsel fails to disclose such a link, for the simple reason that none exists.

The third sentence in paragraph 4 of Article 248 and the second sentence of paragraph 14 of the Annex to Article 249, when read together, yield without any difficulty the clear intention of the makers of the Treaty, that *non-clearing Powers shall be charged with valorization only in claims for compensation for damage or injury, i. e., in cases where war measures had been applied.*

We have up to this point confined the discussion to an analysis of the two Articles and their relation to each other in order to establish, *first*, that Article 248 is concerned exclusively with debts and that valorization under that Article will not lie because the United States did not give the notice prescribed; and *second*, that Article 249 is concerned exclusively with claims based upon the application of war measures and that under paragraph 14 of the Annex debts may become "matters provided for in Article 249," and thus subject to valorization *only* where they have been the subject of such war measures.

We will now inquire whether the provisions in question *were intended to apply in individual suits between the parties,* such as the suit at bar.

That inquiry is immediately and unequivocally answered so far as Article 248 is concerned.

Sub-paragraph (a) of that Article provides:

> "each of the High Contracting Parties shall prohibit as from the coming into force of the present Treaty both the payment and the acceptance of payment of all such debts and also all communications between the interested parties with respect to the settlement of the said debts otherwise than through the Clearing Offices."

Paragraph 3 of its Annex provides:

> "The High Contracting Parties will subject contraventions of paragraph (a) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts except in accordance with the provisions of this Annex."

How stands the case with Article 249?

The first intimation of the answer we find in the third sentence of Article 248 (4) which we have had so many occasions to quote. It provides that:

> "The proceeds of liquidation of enemy property rights and interests mentioned in Section IV and in the Annex thereto *will be accounted for through the Clearing Offices,*" etc.

Clearly, governmental action, rather than individual rights directly asserted between the parties, is contemplated by this clause of the Treaty.

Subdivision 249 (e) at once removes the question from the realm of conjecture into that of certainty. It provides that:

> "Claims made in this respect (for damage or injury inflicted by the application of war measures) by such nationals shall be investigated and the total of the compensation shall be *determined by the Mixed Arbitral Tribunal* provided for in Section VI or by an arbitrator appointed by that Tribunal. *This compensation shall be borne by Austria.*" (Italics ours.)

Note that the claim is to be investigated and the amount due determined by the Mixed Arbitral Tribunal or its arbitrator. The reason is obvious. Since Austria is called upon to foot the bill it was considered proper and fair that a tribunal in which she was represented should participate in the determination of the damage.

The provision immediately following the sentence just quoted is illuminating. It says that enemy property held by the United States

> "may be constituted as a pledge for enemy liabilities."

In other words, the seized property may be held by the United States as security for "this compensation (which) shall be borne by Austria." So that if Austria shall neglect or refuse to pay, the United States, *if it shall see fit to do so*, may have recourse to the security. In order that the lien thus imposed on the private property of enemy nationals shall be legal, Article 249 (j) provides that

> "Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests" in the United States.

Article 249 (e) refers to the Mixed Arbitral Tribunal. In order to learn the character and functions of this tribunal, we must go to Section VI which we have not discussed before. The complete text of Section VI (Article 256) and its Annex of nine paragraphs appear at the end of this brief. Subdivision (a) of that Article provides that within three months from the coming into force of the Treaty the Mixed Arbitral Tribunal shall be established between the United States on the one hand and Austria on the other. The tribunal shall consist of three members. Each of the Governments may choose one member. The president of the tribunal shall be chosen by agreement between both Governments.

Subparagraph (b) of this Article provides that

> "The Mixed Arbitral Tribunals established pursuant to paragraph (a) shall decide *all questions* within their competence under Sections III, IV, V and VII." (Italics ours.)

Section III here referred to consists of Article 248 and its Annex, and Section IV consists of Articles 249 and 250 together with their Annex.

It thus appears that the Mixed Arbitral Tribunal is vested with exclusive jurisdiction—"shall decide *all* questions"—under Sections III and IV. Section IV (Article 249 (e)) provides for the investigation of claims for damage and injury and the determination of the compensation to be awarded by the Mixed Arbitral Tribunal. Under Article 256 (b), therefore, that Tribunal is *alone* clothed with power to pass on a claim based upon Article 249.

We believe it stands demonstrated that the provisions of Articles 248 and 249, together with their respective Annexes, have not, and were never intended to have, any application to private suits nor to operate on any private rights between individuals. The design of these Articles

sufficiently evidences their purpose. The two Governments, intending to protect the interests of their respective nationals, entered into a Treaty to which they alone were parties and which they alone could enforce unless rights of enforcement of particular parts of that Treaty were specifically reserved to the nationals.

It is true that in the Treaty of Vienna the United States reserved to itself and to its nationals all the

> "rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same"

to which the United States or its nationals became entitled by reason of the Treaty of St. Germain-en-Laye. But in invoking the rights under any provision of the Treaty of St. Germain-en-Laye due regard must be had to the rights accorded to Austria in such provision. Under Article I of the Treaty of Vienna (United States Treaty, Series No. 659, 42 Stat. L. 1946), it is provided that

> "the United States, in availing itself of the rights and advantages stipulated in the provisions of that Treaty (referring to the Treaty of St. Germain-en-Laye) will do so in a manner consistent with the rights accorded to Austria under such provisions."

Under Article 249 (e) a claim for damage or injury made by a United States national must be investigated by the Mixed Arbitral Tribunal or its arbitrator and the compensation determined by them. Under Article 256 (a) Austria has the right of representation on this Mixed Arbitral Tribunal and, therefore, has the right to participate in the determination of the amount of compensation to be awarded in a claim for damage or injury—a right which is not accorded to Austria in a suit under Section 9 of the Trading with the Enemy Act.

The plaintiffs' counsel concede on page 56 of their brief that

> "in lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Austria for the presentation and consideration of claims."

They add that

> "the assessment by such Tribunal was not, however, an exclusive provision, for the United States under Article 249 was to have the right to retain and liquidate the property belonging to Austrian nationals within its territory and to carry out its liquidation in accordance with its laws."

The claims convention referred to is an agreement between the United States, Austria and Hungary (U. S. Statutes, 1925-1926, Part II, p. 221) in which the preamble recites that the signatories

> "being desirous of determining the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the Treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, which secured to the United States and its nationals rights specified in a joint resolution of the Congress of the United States of July 2, 1921, including rights under the Treaties of St. Germain-en-Laye and Trianon, respectively, have resolved to submit the questions for decision to a commissioner."

Article I of that Agreement provides that the

> "three Governments shall agree upon the selection of a commissioner, who shall pass upon all claims."

The various claims within the jurisdiction of this commissioner are then enumerated as follows:

> (1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property rights and interests;
>
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property rights and interests since July 31, 1914;
>
> (3) Debts owing to American citizens.

It is obvious that the Tripartite Claims Commission erected under this Agreement is the equivalent of the Mixed Arbitral Tribunal referred to in Article 249 of the Treaty. Any argument relating to the jurisdiction and powers of the Mixed Arbitral Tribunal applies with equal force to the Tripartite Claims Commission. It is equally true of the Tripartite Claims Commission that it has exclusive jurisdiction to assess and determine the amounts to be paid by Austria and Hungary to nationals of the United States, whether for injury to property, rights and interests, or in satisfaction of debts under the provisions of Article 249 of the Treaty.

We should not be misunderstood. We do not claim that an American national must submit to this Tripartite Claims Commission any claim he has for damage or injury to his property, rights and interests, or for a debt owing to him by an Austrian national. He may, if he chooses, invoke the jurisdiction of the courts of the United States, as the plaintiffs have done here, under Section 9 of the Trading with the Enemy Act, or in any other suit. But when he invokes the jurisdiction of the courts he will not be entitled to the benefit of the valorization pro-

visions of Article 243, since in the determination of the amounts due, where valorization is sought under that Article, Austria, which is primarily responsible for the payment of any award made, is entitled to be heard.

To restate the proposition briefly, even at the hazard of repetitiousness, the plaintiffs have an election. They may enforce their claim through the courts of the country if they choose. In that case, the amount of their claim will be determined in accordance with general principles of law. If they desire to take advantage of the valorization provisions under the Treaty, they must prosecute their claim through the Tripartite Claims Commission, which has exclusive jurisdiction in that regard.

The views set forth in this point are supported by the decisions of the Circuit Court of Appeals (2nd Cir.) in the cases of *Guinness* v. *Hicks*, 299 Fed. 538, and *Zimmermann* v. *Hicks*, 7 Fed. (2nd Series) 443.

When the Supreme Court decided the case of *Guinness* v. *Hicks*, 296 U. S. 71, it stated at the end of its opinion that it was not necessary to pass on arguments based on Articles 296 and 297 of the Treaty of Versailles (which are homologous with Articles 248 and 249, respectively, the Treaty of St. Germain-en-Laye).

However, when this court decided the case of *Humphrey* v. *Deutsche Bank* (No. 224, October Term, 1926), it must impliedly have decided that the provisions of Articles 296 and 297 of the Treaty of Versailles did not apply to an action brought under Section 2 of the Trading with the Enemy Act to establish a debt such as the debt in this case, namely, a debt based upon a bank deposit in a foreign bank payable in foreign currency abroad. The reason this court did not pass on the Treaty question in the *Guinness* case was because there the debt was payable in the United States and had become due before the

war. Irrespective of Treaty provisions, therefore, it was payable in dollars in the United States, and the valorization provisions of the Treaty of Versailles were not material. Not so in the *Humphrey* case. In that case the debt was payable in marks in Germany and had been matured by a demand in June, 1915. If the valorization provisions of the Treaty of Versailles apply to a suit brought under Section 9 of the Trading with the Enemy Act to establish such a debt, the *Humphrey* case was squarely within the Treaty and valorization would have been permitted.

It is true that in the briefs of counsel submitted in the *Humphrey* case the question of the applicability of Articles 296 and 297 of the Treaty of Versailles relating to valorization was not argued. But it cannot be said that this court was not aware of these provisions. They had been urged for its consideration shortly before in the *Guinness* case. The briefs of counsel in the *Humphrey* case contained numerous allusions to the decision of the Circuit Court of Appeals of the Second Circuit, both in the *Guinness* case and in the *Zimmermann* case. In both these cases the applicability of those Treaty provisions had been fully discussed and rejected by the Circuit Court of Appeals. We, therefore, conclude that in spite of the fact that the opinion of the Supreme Court in the *Humphrey* case makes no direct reference to the rights of valorization under Treaty provisions of a foreign debt payable abroad, the question was before the court, nevertheless, and in holding that *Humphrey* was entitled to the judgment day value of his German mark deposit, the court intended to, and did, reject the theory that the provisions of the Treaty required that the debt be valorized.

The many Mixed Arbitral Tribunals erected under the terms of the Treaty between Governments of the Allied Powers on the one hand, and Germany, Austria or Bul-

garia, respectively, on the other, have had frequent occasion to pass on this question.

The decisions are reported in a series of publications entitled "Tribunaux Arbitraux Mixtes—Recueil Des Décisions," of which five volumes have already appeared. These publications could not very well be official, since they contain in chronological order the decisions handed down by the Anglo-German, Anglo-Austrian, Anglo-Hungarian, German-Belgian, Bulgaro-Belgian, Austro-Belgian, Hungaro-Belgian, Franco-German, Franco-Bulgarian and twelve other Mixed Arbitral Tribunals. That the publications, though not official, are absolutely authoritative there can be no question. The publications are issued under the auspices of the Presidents of the various Mixed Arbitral Tribunals and under the editorship of Gilbert Gidel, Professor of the Faculty of Law at the University of Paris. They are found in every law library of importance in the country and are, of course, available in the Library of Congress. We, therefore, think it not improper to cite these decisions in the usual way, namely, by reference to the Tribunal, name of the case, volume and page.

In the case of *Margaret Williams* v. *Berlinische Lebensversicherungs Gesellschaft* (decided July 24, 1925, Recueil, etc., vol. V, p. 322), the Anglo-German Mixed Arbitral Tribunal had squarely before it the question of valorization of debts as such.

The decision it handed down in that case is so clear, so carefully reasoned and so apposite that we feel justified in setting it forth substantially in full:

> "At the hearing the British Government Agent contended that the Tribunal had arrived at a wrong conclusion in their Second Interlocutory Decision of Claim 631, National Bank of Egypt v. Bank für Handel and Industrie And German Government

(Recueil, vol. V, page 18), with regard to the rate of exchange and currency applicable to non-clearing debts. He contended that the Tribunal were mistaken in saying that Article 297 deals wholly with State Measures to which private property rights and interests had been subjected during the war. He relied particularly upon the opening words of Article 297. 'The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the Annex thereto.' He also referred to the well known words in the first part of paragraph 14 of the Annex to Section IV, Part X. 'The provisions of Article 297 and this Annex relating to property rights and interests in an enemy country and the proceeds of the liquidation thereof apply to debts, credits and accounts, Section III regulating only the method of payment.'

The Tribunal have reconsidered the question and they have arrived at the following result:

Quite apart from the express provision to be found in the first part of paragraph 14 of the Annex to Section IV, Part X of the Treaty, there is no doubt that debts are included in the words 'property, rights and interests' which head the said Section IV and are repeated in the first phrase of Article 297. But thereby the problem at issue is not solved. According to the second part of paragraph 14, the relevant provisions of Section III apply to such matters as are provided for by Article 297 between what may be called here, for convenience sake, non-clearing States, and between their respective nationals. The contention that, by virtue of the second part of paragraph 14, these provisions rule the payment of debts by the debtor can only be upheld *if it appears that such payment between the respective nationals is one of the matters provided for by Article 297.* After careful and renewed consideration, the Tribunal feel unable to find that this is the case. The first phrase of Article 297

merely refers to the provisions in Section IV, Part X, and the Annex thereto, by declaring that these provisions rule the question of private property rights and interest in an enemy country. *In other words, it merely indicated the field of application of these provisions* but it cannot be considered as itself providing for such matters and especially for the payment of debts between the nationals of non-clearing States. Such matters are to be looked for in the provisions themselves and that was rightly felt by the Counsel for the British Government Agent and the National Bank of Egypt, when they relied on Article 297 (a) as being the provision to which Part 2 of paragraph 14 could be considered as referring.

With regard to Article 297 (a) and the other parts of Article 297, the Tribunal, after renewed and careful consideration, feel it impossible to arrive at another conclusion than that declared by them in their decision in the Claim of the National Bank of Egypt v. German Government.

In their opinion it cannot be said that payment of debts between the respective nationals of non-clearing States is a matter provided for in any of the provisions of Article 297, and, indeed, the Tribunal are confirmed in the view that this article deals with State measures. The only matter provided for between individuals appears in the isolated and exceptional provision in paragraph 5 of the Annex to Section IV, Part X of the Treaty, but that provision does not deal with debts and, moreover, paragraph 14, Part 2, refers only to Article 297 and not to the Annex thereto.

As a result, the contention set up by the British Government Agent does not appear to be supported by the stipulation in the Treaty on which he relied and, in the opinion of the Tribunal, there remain the reasons given by them in their decision on the claim of the National Bank of Egypt and which have led them to the conclusion that as between the respective nationals themselves the Treaty has, with regard to payment of debts, provided nothing be-

> yond the State measures reserved to the Allied and Associated Powers by Article 297 (b) and by Article 297 (h) (2) and paragraph 4 of the Annex to Section IV, Part X of the Treaty." (Italics ours.)

In the decision of March 13, 1925, by the same tribunal in the case of *National Bank of Egypt* v. *German Government and the Bank for Commerce & Industry* (Recueil V, p. 18) the Tribunal said:

> "Article 297(a) deals exclusively with measures taken by the German Government, and so conversion into an allied currency at the pre-war rate of exchange would apply to German debts, but probably not to German claims, which are in no way affected by article 297(a). *This currency and rate of exchange would be imposed on the German debtor only because and in as much as the German government had subjected the debt to an exceptional war measure.*" (Italics ours.)

We have, of course, given the quotation as it appears in the text of the opinion; but we believe the Tribunal inadvertently interchanged the word "debts" in the fourth line of the quotation with the word "claims" in the fifth This appears evident from the context.

Further on, the Tribunal say:

> "Desirous not to overlook any aspect which the problem at issue may present, the Tribunal have also considered whether the Treaty disclosed on the part of the signatory powers, a common intention of setting up as a general principle ruling the settlement of debts between their respective nationals, the conversion into an allied currency at the pre-war rate of exchange provided for in article 296 and paragraph 14 of the annex to section IV, Part X. *But this is not the case. On the contrary, it is a striking fact that with regard to those States which have adopted section III, the benefit of this*

conversion is not extended to debts not to be settled through the Clearing Offices." (Italics ours.)

They say further:

"The notes exchanged during the peace negotiations between the German delegation and the delegates of the Allied and Associated Powers show that the question of currency of payment and of the rate of exchange was discussed between them only with regard to section III and *it may be assumed that, if the signatory powers had contemplated such a sweeping measure as the settlement at the pre-war rate of exchange of all debts whatsoever between their respective nationals, in the absence of a clearing system, they would have inserted in the treaty a clear and express provision for that purpose and they* would not have thought of deciding it in four words inserted incidentally in what might appear to be an enigmatic provision in a paragraph of the annex to a section which deals not with the settlement of debts between the private parties concerned, but with measures taken by the States in that respect." (Italics ours.)

To the same effect as the foregoing, is the decision of the German Polonian Mixed Arbitral Tribunal in the case of *Michalowski* v. *Deutsche Bank* (Recueil V, p. 463); Serbo Bulgarian Mixed Arbitral Tribunal, in the case of *Dame Klopper* v. *Banque Generale de Bulgarie* (Recueil III, p. 420); Anglo Bulgarian Mixed Arbitral Tribunal, in the case of *Stevenson & Co., Ltd.*, v. *Banque Nationale del Bulgarie* (Recueil II, p. 77); German-Czechoslovakian Mixed Arbitral Tribunal, in the cases of *Zundhutchen* v. *Patronen Fabrik A. G.* v. *Westbank A. G.* (Recueil III, p. 982) and *Goldschmidt* v. *Hecsch Hinrichsen & Co.* (Recueil IV, p. 530).

In the case of *Pegamoid* v. *The German Government and Deutsche Staats Bank* (Recueil III, p. 561), decided by the Belgo German Mixed Arbitral Tribunal, a debt was

valorized upon the ground, expressly stated, that it had been subjected to war measures.

The same tribunal in the case of *Cia des Metaux Overpelt-Læmmel* v. *Mitteldeutsche Credit Bank* (Recueil V, p. 83) considered a debt which had become due during the war, but had not been subjected to any war measures. The tribunal rejected the claimant's contention that the debt should be valorized, regardless of the application of exceptional war measures, and refused valorization.

B.

The Treaty of St. Germain-en-Laye was signed on September 10, 1919. Article 381 of that Treaty, among other things, provides as follows:

> "A first proces-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Austria on the one hand and by three of the principal Allied and Associated Powers on the other hand.
>
> From the date of this first proces-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty, this date will be the date of the coming into force of the Treaty.
>
> In all other respects, the Treaty will enter into force for each Power at the date of the deposit of its ratification."

The first proces-verbal of the deposit of ratifications was drawn up on July 16, 1920, and was signed on that day in Paris, thus bringing the Treaty in force as of that day.

The United States did not ratify the Treaty. The Joint Resolution of Congress, approved July 2, 1921, however, declared the state of war between the United States and Austria at an end, and reserved to itself and its nationals

"any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the Armistice signed November 3rd, 1918, or any extension or modifications thereof; or which were required by or are in the possession of the United States of America, by reason of its participation in the war or to which its Nationals have thereby become rightfully entitled; or which under the Treaty of St. Germain-en-Laye or the Treaty of Trianon have been stipulated for its or their benefit; or to which it is entitled as one of the principal Allied and Associated Powers; or to which it is entitled by virtue of any act or acts of Congress or otherwise" (Sec. 4, Joint Resolution of Congress, approved July 2, 1921).

On August 24, 1921, the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, was signed at Vienna.

That Treaty contained the following provision (Art. 2, Sec. 5):

"That the periods of time to which reference is made in Article 381 of the Treaty of St. Germain-en-Laye shall run with respect to any act or election on the part of the United States from the date of the coming into force of the present Treaty."

Article 3:

"The present Treaty shall be ratified in accordance with the Constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Vienna."

This Treaty was ratified by Austria on October 8, 1921, and by the United States on November 8, 1921, and by its terms came into force on November 8, 1921.

Where a treaty fails to specify the time as of which it shall come into force, it is deemed to come into force upon its ratification.

In the case of *Haver* v. *Yaker*, 76 U. S. 32, Mr. Justice Davis, delivering the opinion for a unanimous court, said (p. 34):

> "It is undoubtedly true, as a principle of international Law, that as respects the rights of either Government under it, a Treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratification has a retroactive effect, affirming the Treaty from its date. *But a different rule prevails where the Treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the Treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications*, and this we understand to have been decided by this Court in *Arredondo's* case, reported in 6th Peters (page 749)." (Italics ours.)

To the same effect it was held in the case of *Dooley* v. *The United States*, 182 U. S., at p. 230.

The rule was applied in the late case of *De Bian* v. *Normandy Order Co.*, 228 Fed., at p. 240 (a decision of the District Court of N. J.).

In the case of *U. S.* v. *Grand Rapids*, 91 Cir. Ct. of App. 265, 6th Cir., at p. 269, the rule is repeated as follows:

> "While it is a principle of international law that a treaty takes effect by relation as of the date it was signed although not ratified until later, this is only so as between the contracting nations. Private rights are not effected by such a treaty until it is ratified; *for only then by our Constitution does it became the law of the land.* This is a distinction well settled by the decisions." (Italics ours.)

The opinion cites in support:

U. S. v. *Arrendondo*, 6 Peter 691.
Davis v. *Parish, etc.*, 9 Howard 280.
Haver v. *Yaker*, 76 U. S. 32.
Shepard v. *Life Insurance Company*, 40 Fed. 341.

Under these authorities, even if nothing was contained in the Treaty of St. Germain, or in the Treaty of Vienna, specifying the time when each shall come into force, the Treaty of St. Germain would have come into force no earlier than on July 16, 1920, and the Treaty of Vienna on November 8, 1921.

The conclusion is rendered impregnable by the provisions of the Treaties themselves (Art. 381 of Treaty of St. Germain; subdiv. 5 of Art. 2 and Art. 3 of Treaty of Vienna).

No right or benefit could accrue to the United States or any of its citizens under these Treaties before November 8, 1921 (the ratification of the Treaty of Vienna). None certainly could accrue before July 16, 1920 (the ratification of Treaty of St. Germain). *But the defendant bank made the deposit on April 1, 1920, which was long before the Treaty came into force.*

Even if it were to be conceded that the Treaty is effective to control the method of payment of a debt from a foreign national, where such debt was in existence at the time that the Treaty came into force, it could not be effective on debts which had become discharged before it came into force. The Treaty had no retroactive power; it could not alter events which had happened before it was born. Suppose the debt had been discharged on April 1, 1920, by a payment to plaintiffs instead of by deposit. Could they, on the coming in force of the Treaty, claim the difference between the rate at which payment had been accepted and the rate specified in the Treaty? We venture

to say no. Yet one method of discharge is as good as another, provided it is sanctioned by law or by agreement between the parties.

On April 1, 1920, when the defendant bank made the kronen deposit under Section 1425, the Treaty of St. Germain-en-Laye may have been one of those events which cast their shadows before; it may have been a hope to some; a fear to others; an expectation to all; but it was not a treaty and neither imposed its obligations on the defendant bank nor conferred its benefits on the plaintiffs.

POINT IV.

If the court deposit made by defendant bank on April 1, 1920, should be held ineffective as a discharge, the plaintiffs are entitled to recover their pre-war kronen balance, without interest until April 1, 1920, but with 2½ per cent. interest thereafter at the judgment day rate only, because A—this case is governed by the rule in *Humphrey's* case, B—no account was stated, C—the debt being a bank balance could be matured only by a demand, and a demand has not been made, and D—the outbreak of the war did not mature the debt.

A.

In the case of *Die Deutsche Bank Filiale Nurnberg* v. *Humphrey,* No. 224, October Term, 1926, this court squarely held that in a suit brought by an American citizen under Section 9 of the Trading with the Enemy Act to establish and recover a German mark bank balance due from a German bank and payable in Germany, the plaintiff may recover only at the "judgment day rate." We use this phrase as the equivalent of "the moment when

the suit is brought" (the words used in the *Humphrey* opinion) in order to distinguish this measure of recovery from the "breach day" measure. It will be conceded, we think, that in this suit there is no difference in the amount of damage that may be assessed between the date of judgment and the date when suit was brought.

The stipulated facts in the case at bar establish that the defendant bank, a Vienna banking corporation, with no office in the United States, received from the plaintiffs, American citizens, before the war, kronen deposits which were payable on demand at its banking house in Vienna (R. 103 *et seq.*). The situation being precisely the same as in *Humphrey's* case (except that the defendant bank denies any breach on its part), the rule there established should apply.

But the plaintiffs' counsel argue that the proper precedent to follow is the case of *Guinness* v. *Hicks*, 269 U. S. 71, where this court held that in a suit under the Trading with the Enemy Act brought by an American citizen against a German debtor to recover a mark debt due and payable in the United States, the plaintiff may recover at the "breach day" rate.

Their argument (Plaintiffs' Brief, pp. 22 *et seq.*) may be concisely summed up as follows:

The only point of difference between the records of the two cases is that in the *Guinness* case "the plaintiffs *resided* in the United States" at the time of the breach, whereas, "in the *Humphrey* case, at the date of demand, the plaintiff *was* in Germany." Since the Supreme Court said that Guinness' debt was payable in the United States and Humphrey's in Germany, it follows that in the Supreme Court's opinion Humphrey's *presence* (not *residence*, please note) in Germany at the time he made his demand there gave his debt a German situs.

We have no doubt whatever that the plaintiffs' distinguished counsel have misread the records in the two

cases. For it appears in both that the plaintiffs were citizens and residents of the United States, not only at the time suit was brought, but also at the time the alleged breach occurred. True, Humphrey testified, and the trial court found, that he had orally demanded his bank balance in Nurnberg in 1915. But counsel's inference from that circumstance alone, that the situs of the debt was in Germany and that that was the point of distinction this court found between the cases, is without basis. It will be granted that the situs of a debt is the domicile of the creditor. This does not mean, however, that a debt acquires a new situs each time the creditor *visits* a new locality.

The differences in fact upon which this court based its distinction in ruling are plain.

The parties in the *Guinness* case stipulated the facts. It appears from the stipulation that the plaintiffs therein named were residents of the United States and that the defendants, residents of Germany, and enemies, owed them a certain sum in marks upon an account stated under the date of December 31, 1916, acknowledged by them. *The stipulation does not state where the debt was payable. Nor does it state that the defendants were bankers, or that the debt was a bank balance.* By implication of law, therefore, the debt was payable in the United States, the domicile of the creditor.

The *Humphrey* case presents a totally different state of facts, both by oral testimony and by stipulations of evidence. It appears there, that while Humphrey was indeed a resident of California and a native born citizen of the United States, the debt he sought to recover was *a bank deposit in marks, payable on demand in a banking house at Nurnberg, Germany.* Therefore, to quote Mr. Justice Holmes, in his decision for the majority in the *Humphrey* case (*The Deutsche Bank Filiale, Nurnberg, Petitioner*, v.

Charles Franklin Humphrey, No. 224, October Term, 1926, decided November 23, 1926):

> "Unlike Hicks v. Guinness, 269 U. S. 71, at the date of the demand, the German bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his creditor here. Davis v. Mills, 194 U. S. 451. See Western Union Telegraph Co. v. Brown, 234 U. S. 542. We may assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See Societe Des Hotels Le Touquet Paris Plage v. Cummings (1922), 1 K. D. 451. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it. Legal tender cases. 12 Wall. 457, 548, 549. Obviously in fact, a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

Which fits the defendant bank's case here precisely; for here, as in the *Humphrey* case, the plaintiffs deposited kronen in an Austrian bank in Vienna, there repayable in kronen on demand. We quote from the stipulation of facts in the instant case (R. 36):

> "For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payments of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise and drawn on and payable at the defendant, Wiener Bank Verein, at Vienna."

The appropriate precedent to be followed is, therefore, the rule in the *Humphrey* case, and not the rule in the *Guinness* case.

In declaring in favor of the "judgment day" rule as opposed to the "breach day" rule, the Supreme Court did not establish any novel proposition of law. On the contrary, it followed the course adopted by the soundest judicial authorities on the question, here and in England.

Sirie v. *Godfrey*, 196 A. D. (N. Y. 529.
Marburg v. *Marburg*, 26 Md. 8.
Grant v. *Healey*, 5 Sumner 523.
Smith v. *Shaw*, 2 Wash. 167.
Lee v. *Willcocks*, 5 Serg. & Rawlins 48.
Hawes v. *Wolcock*, 26 Wis. 629.
The Hurona, 268 Fed. 910.
Liberty National Bank v. *Burr*, 270 Fed. 251.
Societe des Hotels etc. v. *Cummings* (1922), 1 K. B. 451.

So that our argument may be complete, we shall quote pertinent passages from some of the cases just cited. If the Court, in view of the *Humphrey* case, should think that unnecessary, we respectfully suggest that they pass immediately to page 74, where the discussion of the second subdivision of this point begins.

In the case of *Sirie* v. *Godfrey,* 196 A. D. 529, the defendant in New York was indebted to the plaintiff in France in the sum of 10,450 francs. The debt arose upon the sale of apparel at Paris, France, in 1913 and 1914. The plaintiff commenced an action in New York in 1920, claiming to be entitled to the sum of $2,004.79, which was the equivalent of 10,450 francs, the purchase price of the wearing apparel, according to the rate of exchange prevailing in 1913 and 1914.

The Court (Merrell, J.) unanimously affirming the Trial Court, said:

> "I think the Court correctly decided that the contract between the parties was a simple one of sale of merchandise to be paid for by the defendant in French francs. I am further of the opinion that, even assuming that the defendant failed to pay said indebtedness when the same became due, nevertheless, the plaintiff cannot recover upon the trial the American equivalent of 10,450 francs, the purchase price of said merchandise, at the rate of exchange at the time said indebtedness was payable, but that at most the plaintiff was entitled to recover in American money the equivalent of the French francs stipulated in the contract at the rate of exchange prevailing at the time of the rendition of judgment.
>
> This was a French contract for the sale in France of French goods for which the purchaser agreed to pay in French francs at Paris, France.
>
> At any time before suit was brought, the defendant could have tendered the plaintiff at Paris,

> France, the 10,450 francs in full payment of her claim, and plaintiff would have been compelled to accept the same. Indeed, as late as October 4th, 1919, but seven months prior to the commencement of the action, in her letter to defendant, the plaintiff claimed no more than payment of the 10,450 francs in discharge of defendant's indebtedness to her. *The purchase price of the goods in question was not payable in American dollars, nor was it payable in German marks. It was payable in French francs and by merely bringing action in this jurisdiction, the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France.* * * * I am of the opinion that the plaintiff was entitled to recover judgment herein against the defendant upon the proofs presented for the equivalent in money of the United States of America of 10,450 francs at the rate of exchange prevailing at the time of the trial." (Italics ours.)

In the case of *Marburg* v. *Marburg*, 26 Md., p 8, the facts were (as stated by the Justice writing for the court of last appeal) as follows:

> "This suit was brought to recover a balance due for goods sold to the appellant at Frankfort on the Main. The claim stated in the bill of particulars to be 26317.44 florins is admitted and it appears that this sum, by an agreement between the parties, was to be paid to the appellee in florins at Frankfort, the place of his residence. The only question in the case related to the method or rule for ascertaining the money recoverable in the currency of this country to pay the debt payable in Frankfort in florins."

The Reporter states the Court's ruling in the syllabus as follows:

> "A creditor suing here for an amount payable in a foreign country in the currency of that country

is entitled to recover in the currency of this country an amount sufficient to produce the sum of the debt where it was made payable, or in other words, an amount equal to what he must pay to remit the debt to the place where it was payable; and the amount so recoverable should be computed according to the rate of exchange at the time of the trial or judgment."

The opinion is an interesting one and deserves extended quotation.

> "This subject has been discussed in American as well as in the English Courts, and the same doctrines as we think have been finally settled in both. * * * Story, J., in Grant v. Healey, 3 Sumner 523, said:
>
> 'That whenever a debt made payable in one country is sued upon in another, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay, for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries and then to have the rate of exchange added or subtracted from the amount as the case may require in order to replace the money in the country where it ought to have been paid.'
>
> This doctrine he propounded as one founded upon principles of reciprocal justice. In the case of Lee v. Willcocks, 5 Serg. & Rawlins, 48, the Court declares the settled rule to be,
>
> 'Where foreign money is the object of the suit, to fix the value according to the rate of exchange at the time of trial,' and the same rule was applied in the case of Smith v. Shaw, 2 Wash. 167. * * * The best considered cases bearing on this question are collated in 3 Kent's Comm. 317 (note), and in 2 Par. Notes & Bills, 370, and the rule adduced from them is, that a creditor suing here for an amount payable

> to him in a foreign country, in the currency of that country, is entitled to recover an amount sufficient to produce the sum of the debt where it was made payable, or in other words, an amount equal to what he must pay to remit the debt to the place where it was payable. It will also be seen from the authorities referred to that the amount recoverable should be computed according to the rate of exchange at the time of the trial or judgment."

The case of *Lee* v. *Willcocks,* cited in the foregoing opinion, was a Pennsylvania case, in which the court stated the "settled rule" as follows:

> "With regard to the Turkish piaster there has been an evident mistake * * * the settled rule is where foreign money is the object of the suit to fix the value according to the rate of exchange at the time of the trial."

In the leading Wisconsin case, *Hawes* v. *Wolcock,* 26 Wisc. 629, at p. 636, the court formulates the "true rule" as follows:

> "In view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this of course the premium should be estimated at the rate prevailing at the time of trial. By this rule the holder would neither gain nor lose by the fluctuations of the rate, but whenever he obtained a judgment, would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties and serves therefore to indicate the true extent to which the

difference in such cases should affect the amount of recovery."

In the case of *The Hurona,* reported in 268 Fed. Rep., p. 910, advances were made at Marseilles, France, by the libelant to the master of the steamship Hurona, amounting to some 119,000 francs, between June 3rd and July 3rd, 1919. The steamship was libeled in New York for failure to repay these advances. The rate of exchange of French francs at the time the advances were made was 6.85 francs to the dollar, but at the time of trial the exchange was 13.20 francs to the dollar.

The only question before the court was: Which rate of exchange should be adopted in giving judgment; the rate prevailing at the time the advances were made or the rate prevailing at the time of trial? The District Judge followed the American rule in an opinion from which we quote:

> "I think there can be no doubt that the amount due from the vessel to the libelant was payable in France, where the advances were made and the services rendered. The only obligation of the vessel was to pay 119,007.65 francs in France; so long as this is performed, and that number of francs, plus interest, is paid to libelant, its claims are fully satisfied, and it is completely indemnified. This is, therefore, purely a case of transmitting funds from one country to another, and of rendering a decree which will enable the libelant to have the amount of money in francs which was due to it in France on the 12th day of July, 1919.
>
> The dictum of Mr. Justice Story in Grant v. Healey, Fed. Case No. 5,696, and of Mr. Justice Washington in the case of Smith v. Shaw, Fed. Case No. 13,107, likewise the decision of the Supreme Court of Wisconsin in Hawes v. Wolcock, 26 Wis. 629, are in accord with my conclusion."

The same question arose in the Federal jurisdiction for the Pennsylvania district, in the case of *Liberty National Bank of N. Y.* v. *Burr*, 270 Fed. Rep. 251.

In a closely reasoned opinion, the court decides the rule in conformity with the rule in New York, Wisconsin, Maryland and with the Federal rule. We quote from that opinion:

> "The promise was to pay in pounds sterling. The cause of action is based upon what by the acceptance is the equivalent of the promissory note of the defendant payable in pounds sterling. Any judgment entered must be for a sum expressed in the money of account of the U. S. The only controversy is over the fixing this sum * * * a promise to pay a sum of money, expressed in the terms of any money of account is kept by payment in that money. Putting the same thought in the concrete, a man who promises to pay a thousand pounds sterling, keeps his promise if he pays a thousand pounds sterling at the maturity of the note or other obligation he has given, and although he does not keep his promise to pay the note at maturity, if he pays at a later date, he none the less meets his obligation if he later pays the thousand pounds with interest for the delay * * *. This means he must pay at the rate of exchange prevailing at the time of payment. Applying this principle for the determination of the sum for which the judgment should be entered, it would be entered in accordance with the ruling in Lee v. Wilcocks. The recovery of judgment for a debt may not always be the practical equivalent of receiving payment of that debt; but it is easy to understand that one may be the legal equivalent of the other, and practically works out the same result if and when the judgment is eventually paid. We say this because the plaintiff in the judgment receives, plus interest, precisely what he would have received had the promise of the debtor been redeemed at the time the judgment was entered."

From the opening of the account and thereafter the defendant bank credited the plaintiffs' account with interest at 2½ per cent. per annum.

> "In the quarterly statements of account rendered by the defendant bank to the plaintiffs, the fact that interest was so credited at such rate was shown and the plaintiffs did not object to the rate * * *" (Stipulation of Facts, R. 47, fol. 140).

In the case of *Warren* v. *Tyler*, 81 Ill. 15, the court said:

> "Tyler, in his testimony, states that his firm had been charging appellant seven per cent. in their dealings with him, and he had been paying it. This, in the absence of proof to the contrary, was evidence from which an agreement to pay that rate might be inferred."

We submit that there being no evidence of what the legal rate in Austria is or whether there is a legal rate prescribed, the conventional rate should be approved since the parties themselves fixed it. The deposit in court included interest at the agreed rate down to the date of deposit; the defendant bank, therefore, deposited the entire debt *including interest* to the date of deposit, regardless of whether or not there had been a default, a breach or an acceleration of maturity.

Furthermore, the account was subject to the law of Austria. There is no evidence that the rate agreed upon is not the legal rate. The presumption is that the conventional rate is not different from the legal rate. It follows that the rate of 2½ per cent. is the proper rate to compute after April 1, 1920.

B.

The plaintiffs claim that an account was stated as of April 6, 1917 (p. 25 of their brief).

The only evidence to support this claim is a letter from the defendant bank dated *April 1, 1920,* and received by plaintiffs *April 23, 1920,* in which defendant bank states that the plaintiffs' pre-war balance as of April 6, 1917, was K3,331,799.03 (R. 108, fol. 322; R. 111, fol. 333).

We understand an account stated to be an agreement by both parties that the balance as struck therein against one of them, is correct. (We will discuss the legal aspects of an account stated later.) The plaintiffs here could not have agreed to the account before *April 23, 1920,* when they received the letter of the defendant bank, dated *April 1, 1920,* containing the alleged account.

It follows that there was no account stated prior to April 1, 1920, the date of the court deposit relied on by the defendant bank as a discharge.

But we submit that there was no account stated at any time.

Before discussing the law of an account stated, it should be remarked that references to the *Guinness* case in this connection are misleading. Neither the Trial Court nor this Court was called upon to decide whether the transactions between the parties in the *Guinness* case gave rise to an account stated. *The parties themselves* stipulated in that case that

> "On April 6th, 1917, the defendant, Delbrueck, Schickler & Co., was indebted to said firm of Ladenburg, Thalmann & Co. in the sum of Marks 1079.35 *as of January 1st, 1916, as shown by an account stated, dated December 31st, 1916, duly acknowledged by the defendant, Delbrueck, Schickler & Co.*" (Italics ours.)

There is no such stipulation in the case at bar.

In their brief, counsel for the plaintiffs say (Plaintiffs' Brief, pp. 26-27) that the defendant bank *admits the account stated* in paragraph 6 of the stipulation (R. 37) and in paragraph 8A amending the stipulation (R. 47), in the following language:

> "On or about the first day of April, 1920, the defendant, the Wiener Bank Verein, deposited in the Circuit Court for the Interior at Vienna, in Part 6 thereof, the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6th, 1917."

And again:

> "The deposit made in the Circuit Court of Vienna, Part 6, on April 1st, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6th, 1917, included a further sum of kronen sufficient to equal two and one-half per cent. per annum interest down to April 1st, 1920, the date of such deposit on the amount stated to be due and owing to the plaintiffs as of April 6th, 1917."

If counsel mean to intimate that by the words "stated to be due and owing to the plaintiffs as of April 6, 1917," defendant bank in *December, 1923*, admitted, intended to admit, *or was understood by plaintiffs to admit* that there was an account stated between the parties as of April 6, 1917, they are entirely wrong. No such admission was intended, and the words fairly interpreted, fail to convey it. The words "stated to be due and owing" obviously refer to the bill of complaint —the amount stated by the *plaintiffs* therein to be due and owing. The word "stated," as used, clearly is synonymous with "claimed" or "alleged" and the words "due and owing" are those used in the bill of complaint. Obviously, if an ad-

mission had been intended, the stipulation would have said simply, "The number of kronen in its bank *due and owing,*" etc., and not "*stated to be* due and owing." Needless to say, the Circuit Court of Appeals rejected the plaintiffs' construction (which, incidentally, *they did not urge in the District Court*).

Plaintiffs' counsel also point out (Plaintiffs' Brief, p. 27) that the court deposit of April 1st, 1920, included interest at 2½ per cent. per annum, on the balance, down to the date of deposit, and argue that

> "nothing could more clearly demonstrate their (defendant bank's) understanding that the effect of the statement of the account was to create a new obligation immediately due upon which interest would accrue."

This we fail to see. Interest at the rate of 2½ per cent. per annum had been regularly credited to the plaintiffs' account from the time it was opened (R. 47). The court deposit would not have been effective if the interest had been withheld. We see no difference between the legal effect of an interest credit made before April 6th, 1917, and one made later.

Let us now see how the courts have defined an account stated.

This court has held in the case of *Toland* v. *Sprague*, 37 U. S., p. 335, that:

> "The mere rendering of an account does not make it a stated one, but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him; then it becomes a stated account."

The New York Court of Appeals in the case of *Volkening v. De Graaf*, 81 N. Y. 268, at p. 270, held that:

> "An account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance."

Mr. Chief Justice Folger, after giving his definition, says (p. 271):

> "The emphatic words of a count upon an account stated were, in former days, *insimul computassent*, that they, the plaintiff and defendant, accounted together; and the count went on to say that on such accounting the defendant was found in arrear and indebted to the plaintiff in a sum named, and being so found in arrear, he undertook and promised to pay the same to the plaintiff."

In the case of *Stenton* v. *Jerome*, 54 N. Y. 480, the court answers as follows the question "But what is an account stated?":

> "It takes two parties to make one, the debtor and the creditor. There must be a mutual agreement between them as to the allowance and disallowance of the respective claims, and as to the balance as it is struck upon the final adjustment of the whole account and demands of both sides. Their minds must meet as in making other agreements and they must both assent to the account and the balance as correct."

In the case of *Spain* v. *Talcott*, 165 App. Div. (N. Y.) 815, the court said that:

> "The theory upon which rests the finality of an account stated is that it represents an agreement reached by the parties."

And it has been held by the New York Supreme Court in the case of *Downes* v. *The Phenix Bank*, 6 Hill. 297, that no account stated, in the technical sense, arises in a case where a bank strikes a balance upon a plaintiff's bank book. We do not suppose that any distinction exists between striking a balance on a customer's bank book, which was the method used by banks in the past in writing up a customer's book—"balancing" it, and rendering a monthly or other periodic statement of the account, which is the method used by most banks to-day and the method necessarily used where the banker and depositor reside in different countries. We quote the following passages from the opinion:

> "The contract to be implied from the usual course of the business is that a banker shall keep the money until it is called for. * * * Some stress has been laid upon the fact that a balance had been struck upon the plaintiff's bank book by one of the clerks in the bank. That was but the ordinary transaction of writing up the customer's book or, in other words, setting the debits or sums which had been paid upon his checks, against the credits which were given in the book at the time the deposits were made. *It only rendered the account complete up to the time when the balance was struck. It furnished no evidence of a change of the contract upon which the money was received in deposit.*" (Italics ours.)

And again:

> "I think the understanding between the parties (bank and depositor) is that the money shall remain with the banker until the customer, by his check, or in some other way, calls for its repayment. * * * *The banker is not in default and no action will lie until payment has been demanded.* No one could desire to receive money in deposit for an indefinite period with a right in the depositor

> to sue the next moment and without any prior intimation that he wished to recall the loan. I do not find that the point has ever been decided, but it may be that this is the first case where a man has sued his banker without first drawing on him for the money." (Italics ours.)

In conclusion, we would point out that under the *Humphrey* case (*Die Deutsche Bank etc.* v. *Humphrey, supra*) it is quite immaterial whether or not an account was stated as of April 6, 1917, or as of any other date. All the depositor can recover, *even if his bank defaults in payment*, is the number of marks due him with whatever interest might have accrued since the default, expressed in terms of United States dollars at the rate of exchange prevailing "at the moment when suit is brought."

C.

A bank is not required to pay out a depositor's money until he demands it.

> *Downes* v. *Phoenix Bank*, 6 Hill (N. Y.) 297.
> *Clare & Co.* v. *Dresdner Bank* (1915), 2 K. B. 576.

The plaintiffs' counsel do not dispute this, but argue on page 46 of their brief that a demand was made by them on March 25, 1919, by filing a notice of claim in the office of the Alien Property Custodian pursuant to Section 8 (a) of the Trading with the Enemy Act.

The notice referred to (R. 56) appears on its face to be the usual notice prepared by the Alien Property Custodian's office for use by claimants *under Section 9 of the Act*. It states that the nature of the claim made therein is as follows:

"Value	*Cash Balance*	*Face or Par Value of Securities*	*Total Amount*
$	50.02		50.02
Kronen	2,951,027.31	1,080,800.	4,031,827.33

Interest accrued from 1/1/16
Cash bal. at 4%
On securities (see statement filed 2/3/19)."

Section 9, under which this notice was filed, stripped of language not relevant here, provides that any person not an enemy, who claims any right, title or interest in sequestered property of an enemy or to whom any debt is owing from an enemy whose property has been sequestered,

> "may file with the said Custodian a notice of his claim under oath * * * and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property * * * order the payment * * * to said claimant of the money * * *. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity * * * to establish the interest, right, title or debt so claimed, and if suit shall be so instituted, then the money * * * of the enemy * * * shall be retained in the custody of the Alien Property Custodian * * * until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied * * * by the defendant or by the Alien Property Custodian * * * on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated."

Section 8 (a) of the Act provides:

> "That any person not an enemy * * * who is a party to any lawful contract with the enemy * * * the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand * * * may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract * * * and such presentation and demand shall have in all respects the same force and effect as if duly served or made upon the enemy * * * personally."

The plaintiffs argue that the notice of March 25, 1919, under Section 9, was a compliance with the provisions of Section 8 (a).

The argument is an afterthought. In their briefs in the District Court no mention is made of it. We submit, the attempt to fit the notice of claim filed under Section 9 into a demand under Section 8 is as successful as any other attempt to fit a square peg into a round hole.

True, the notice under Section 8 (a) need not follow a set model. But it must state, in language intelligently designed to that effect, that there is a contract or debt which may by its terms be matured by notice or demand and that by the notice filed it is intended to mature it. The notice of March 25, 1919, obviously does not meet the test.

The court below, in discussing the sufficiency of the notice and of the cable of August 6, 1919 (R. 109, fol. 327; R. 110, fol. 328), says (see Opinion, R. 130):

> "On this point of demand the evidence compels us to disagree with the court below. Passing the point that no demand was pleaded other than that of December 15, 1921, on the Custodian, it is argued

that plaintiffs did in legal effect make several earlier demands, viz.: in March, 1919, by filing documents with the custodian and in August, 1919, by an interchange of letters and telegrams with both banks (the reference here is to the defendant bank and to Deutsche Bank).

It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshay which had either been impounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiff's own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established, plaintiffs expressed the desire to go on with pre-war business and maintain their old deposit accounts; and these desires were expressed after March, 1919."

The notice of December 15, 1921, does not even state that the amount of kronen therein mentioned *is due*. It states merely that the "debt arises from a pre-war balance which claimant had with above mentioned enemy or ally of enemy and which said enemy or ally of enemy *now owes* this claimant," etc. (R. 121, fol. 361). There is not a word in it from which it may be gathered that the plaintiffs desired to mature their bank account. We respectfully submit that the notice filed was obviously not intended to serve the purpose of a demand under Section 8 (a) at the time of filing and that it should not be permitted to serve that purpose as a result of an afterthought.

D.

It must again be remarked, that in view of this court's decision in the *Humphrey* case, the questions whether or not a demand was made, or an account stated or the contract matured by the war, have become largely academic.

Since the plaintiffs' learned counsel argue these points at great length, we think it proper, even if not altogether necessary, to examine the conclusions at which they have arrived and to show that they are legally unsupportable.

Counsel for plaintiffs contend that the contract between the parties was terminated by the outbreak of the war. In support of this proposition they cite the cases of *New York Life Insurance Co.* v. *Statham,* 93 U. S. 24, and *Griswold* v. *Waddington,* 16 Johns. 438 (N. Y.). Both cases fail to support plaintiffs' view.

In the *New York Life Insurance* case, suit was brought on a life insurance policy issued in 1851 on the life of a resident of Mississippi. Premiums were paid until the outbreak of the Civil War. During hostilities, premiums could not be paid. The insured died in 1862. The company claimed a forfeiture. The court said at page 30:

> "Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payment."

and at page 31, the court said further:

> "The case therefore is one in which time *is material and of the essence of the contract.* Non-payment at the date involves forfeiture *if such be the terms of the contract as is the case here.* * * * But the Court below bases its decision on the assumption that when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused and forfeiture does not

> ensue. It supposes the contract to have been suspended during the war and to have revived with all its force when the war ended. *Such a suspension and revival do take place in the case of ordinary debts.* But have they ever been known to take place in the case of executory contracts in which time is material?" (Italics ours.)

It thus appears that the *New York Life Insurance* case cited, not only fails to support plaintiffs' contention, but is an authority to the contrary.

The *Griswold* case cited is even more inapplicable. It relates to a contract made by the parties *while their countries were at war with each other.* The Court held that:

> "As soon as a war is commenced, all trading, negotiation, communication or intercourse between the citizens of the country and the enemy, without the direct permission of Government, is unlawful. Therefore no valid contract can exist nor any promise arise by implication of law, from any transaction with an enemy."

That is quite a different question than the one involved here.

It is the established law that contracts such as that in suit are not terminated or dissolved by the war—they are *merely suspended.* As stated by the Supreme Court in the case of *New York Life Insurance Company* v. *Statham* (*supra*):

> "Such a suspension and revival do take place in the case of ordinary debts."

In the case of *Lainar* v. *Micon*, 112 U. S. 454, 464, the Court said:

> "A state of war does not put an end to pre-existing obligations * * * but suspends until the return of peace the right of anyone residing in the enemy's country to sue in our Courts."

Again, in the case of *Hangar* v. *Abbott*, 73 U. S. 536, the Court said:

> "We suspend the right of the enemy to the debts which our traders owe him, but we do not annul the right. We preclude him during war from suing to recover his due * * * but with the return of peace we return the right and the remedy."

See also to the same effect,

Brown v. *Hiatts*, 82 U. S. 184.
Dorsey v. *Kyle*, 96 American Decisions 621.

The English cases are in accord with the above views.

In the case of *Janson* v. *Driefontein* (1902), A. C. 484, Lord Halsbury, the Lord Chancellor said:

> "No contract or other transaction with a native of the country which afterwards goes to war, is affected by the war. The remedy is indeed suspended; an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights of the contract are unaffected and when the war is over, the remedy in the Courts of either, is restored."

So held also in the case of *W. L. Ingle, Ltd.*, v. *Mannheim Insurance Co.* (1915), 1 K. B. 227.

Wm. Finlayson Trotter (*The Law of Contract During and After War*, London, 1919, 3rd Ed., p. 59) states:

> "The general principle that an alien enemy's rights to the performance of, and right of action in a contract concluded and executed by him before war, are only suspended by the war, applies *particularly to contracts which only require for their performance by the other party, the payment of money.*" (Italics ours.)

The rule is thus stated in *Scott's Effect of War on Contracts*, 2nd Ed., page 28:

> "Broadly speaking, I think that ordinary contracts, commercial or other, like sales of goods for future delivery (that is to say, on the cotton or corn markets), charter parties, steamship line conferences or insurance, are dissolved; though the rights of property arising out of them and *already in existence before the war*, such as *debts*, accrued claims for damages return of premiums * * * will be preserved and will be enforcible by action after the war * * * and in those contracts where property is the important thing and the mutual obligations of performance are incidental to the property, when the war is over, the obligations of performance will revive as incidental to the property and thus the whole contract will be merely suspended."

On page 37 of their brief, the plaintiffs' counsel say:

> "These plaintiffs, upon the inception and during the existence of the war, were faced by a dilemma. The account was useless to them unless they could communicate with the defendant bank, whereas by attempting to so communicate they must have taken steps violating the rules of international law, of common law and of statute."

That is not correct. It is established that there were no war restrictions imposed in Austria during the war on property of Americans. The evidence is that defendant bank executed pre-war orders of the plaintiffs even after war began. Nor did the Trading with the Enemy Act forbid absolutely communication with an enemy or ally of enemy. It prohibited such communication only *without license* by the President.

The statute says (Sec. 3 (a)):

> "That it shall be unlawful for any person in the United States, *except with the license of the President* * * * to trade * * * with an enemy."

Licenses by the President are provided for in Section 5 (a):

> "That the President * * * may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons * * * to perform any act made unlawful without such license in section three hereof, * * *."

And Section 5 (b) seems to have been designed specially to meet the situation the plaintiffs say they found themselves in. It reads:

> "That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, *any transactions in foreign exchange,* export or earmarkings of gold or silver coin or bullion or currency, *transfers of credit in any form* (other than credits relating solely to transactions to be executed wholly within the United States), *and transfers of evidences of indebtedness* or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States * * *." (Italics ours.)

By Executive Order of October 12, 1917, the President established a War Trade Board upon which he conferred authority (Executive Order 2729-A)

> "To issue, under such terms and conditions as are not inconsistent with law, or to withhold or refuse, licenses to trade whether directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, * * * an enemy or ally of enemy."

If the plaintiffs had desired to withdraw their balance they could readily have done so through the licensing machinery established by the Trading with the Enemy Act and the Executive Orders made under it. Since the withdrawal would have resulted in transferring a substantial sum of money from an enemy country to our own, an application for a license to that end would surely have been granted.

It is a just inference from the facts to say that the plaintiffs at no time, before or after the outbreak of war, desired to withdraw their deposit.

The plaintiffs were successful international bankers of long experience. They knew in the beginning of 1917 that our country was at the threshold of war with Germany and her ally, Austria. What the legal effect of war would be on their bank balances in enemy countries they might at least have surmised. When war was declared on Germany on April 6, 1917, all doubt which might have survived in their minds about the future of our relations with Austria must have vanished. They unquestionably knew then that we would not remain at peace with Austria while we were waging war on her ally, Germany. The plaintiffs, *had they desired*, could then have taken steps to withdraw their balance in the defendant bank. *No slightest impediment to such a withdrawal existed between April 6, 1917, and December 7, 1917*, when we finally declared war on Austria. Even after war was declared on Austria, the plaintiffs might have withdrawn their balance had they seen fit to do so, *at least so far as the defendant bank and the Austrian Government were concerned.* It is well known that Austria did not adopt any exceptional war measures or measures of transfer in respect of property of Americans, though property of other allied nationals was not so favored. Nothing prevented the withdrawal by the plaintiffs, *except prohibition*

imposed by our laws. These laws, as above shown, did not unconditionally condemn such a withdrawal. They merely required that a license should first be obtained from the President or the War Trade Board.

The plaintiffs' counsel argue (p. 28 of their brief) that their balance in the defendant bank became due at the outbreak of the war, because the contract between the parties was executory and the war having frustrated their intentions to draw against their balance, the contract was dissolved. The argument, we submit, has no merit.

The relation between a bank and its depositor is that of debtor and creditor. That relation has certain well-defined legal aspects. Are these aspects changed by any special purpose or motive the depositor had in entering the relation? It was a matter of indifference to the defendant bank how plaintiffs used their bank balance. They could issue drafts to customers against it; they could direct its transfer in whole or in part, by cable, wireless or otherwise; they could direct credit accounts to be opened in the name of other persons, but the only effect of these transactions on the defendant bank was to substitute other creditors in respect of parts of the balance. It always remained a debtor, with only one duty resting on it—to pay on demand. In what way, then, did this debt differ from any other debt?

The plaintiffs answer this question by saying that:

> "The contract is one of deposit in a bank. The relation created between the parties was that of banker and depositor with all of the mutual undertakings and obligations therein involved. To call the relation merely that of debtor and creditor and then, seeing merely the debt, to apply the doctrine of Hanger v. Abbott, is to regard only one element of the contract and to disregard the balance of the essential characteristics of the relationship by

which continued mutual duties were created" (p. 29, Plaintiffs' Brief).

They then quote from the stipulation of fact the following "admittedly accurate description" of the nature of the account, presumably to show the "continued mutual duties created":

> "For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank Verein, at Vienna."

We submit the proof does not support the allegation. To us the quotation conveys merely that plaintiffs opened a bank account with defendant bank in order to have funds on hand at Vienna for their various purposes. No duty appears to have been assumed by the defendant bank, beyond the duty imposed by law upon every debtor—to repay the debt—with this exception, that while ordinarily a debtor must seek out his creditor, a bank need pay only on demand at its banking house.

When the plaintiffs' counsel complain of the Circuit Court of Appeals because it assumed the relation between the parties to be that of debtor and creditor, they disclose a grievance against every jurisdiction in the United States and in England; for there is not a court here or abroad which considered the question, which has failed to hold that the relation between a depositor and his bank is precisely that between a creditor and his debtor.

Moreover, plaintiffs' counsel seem to be unaware of the implications of their argument.

If they were correct in their view that the contract between them and the defendant bank was dissolved by the war, *they would have no right to recover under it at all.* The only rights they have are predicated upon the theory that since they performed their part of the contract, it was not dissolved by the war, but merely suspended until the advent of peace.

On page 42 of their brief, plaintiffs depart from their original line of argument and base their claim of the maturity of their deposit as of April 6, 1917, upon the ground that the contract had become impossible of performance, and was, for that reason, terminated.

The argument will not stand analysis. For whom did performance become impossible? Not for the defendant bank, surely. As shown above, it was always ready, willing and able to discharge every duty it owed the plaintiffs. There was nothing to prevent. As to the plaintiffs, *they were under no duty to the defendant bank at all.*

POINT V.

The equities are not fairly stated in Point VI of the plaintiffs' brief.

The plaintiffs' counsel begin their analysis of the equities (p. 98 of their brief) with the statement:

> "At first glance, it may appear inequitable for the plaintiffs herein to seek to recover at a prewar rate of exchange moneys owing by an Austrian bank in kronen. We respectfully submit, however, that such is not the case."

There is more perspicuity in the "first glance" of the plaintiffs' distinguished counsel than in their subsequent ones. We submit that it would be grossly inequitable to compel defendant bank to pay back kronen received by it in the ordinary course at Vienna before the war in any other currency, regardless of any rate of exchange. It did not agree to maintain the parity of exchange when it accepted the deposit. No bank ever does. When the defendant bank made its court deposit on April 1, 1920, the krone was still worth about two and one-half cents. Had the plaintiffs accepted the offer of the defendant bank, they would have realized about 20 per cent. of the dollar value of their pre-war kronen deposit. No doubt they expected that they would realize more by going to court. Why should the defendant bank be required to underwrite a loss due entirely to plaintiffs' poor judgment? The defendant bank has not profited by the situation. On the contrary, its losses by currency depreciation have been staggering. Being a Vienna bank, its liquid funds were principally kronen, just as the liquid funds of an American bank would be principally dollars. To dispute this obvious fact would be idle. Plaintiffs' counsel say the equities have changed because they seek to enforce their unjust claim against the defendant bank's pre-war dollars seized here by the Alien Property Custodian. This is a curious argument. Possession may be nine points of the law. Not even the adage states it to be nine points in equity. In the defendant bank's depleted coffers kronen always remained kronen. Just as in the case of the lean kine in Pharaoh's dream, the lean kronen took on no flesh after eating the fat ones.

It has never been held in this country that banks are liable to their depositors for more dollars than the number deposited. And yet, our currency has fluctuated in value at times, like that of other countries. The banks

have always paid a dollar for each dollar deposited, no matter when deposited, and no matter what the fluctuations were, upwards or downwards.

To apply the opposite rule would overnight ruin every bank in the country, in the event of a sudden depreciation in our currency. What would happen if all the banks were obliged to pay even $1.10 for each $1 deposited? With $1,000,000 capital and $10,000,000 deposits, where would a bank be the morning after?

And this court has so held in the case of *Humphrey* v. *Deutsche Bank* (*supra*):

> "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it (citations). Obviously, in fact, a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

Moreover, in their analysis of the equities, the plaintiffs by no means tell the whole story. They do not tell, for instance, how much of this kronen balance had been sold by them by means of drafts, which have long been outlawed in the hands of the holders. Plaintiffs say on page 98 of their brief:

> "Prior to the entry of the United States into war, plaintiffs attempted, as did many other financial houses, to exhaust their deposits of kronen in order that they might not have property in enemy countries in the event that a state of war arose."

The only way plaintiffs had of exhausting their deposits was by sales of kronen exchange. The outbreak of the war found them with a balance of over 3,000,000 kronen. It is more than likely that only a small portion of that balance represented kronen still owned by the plaintiffs. No facts have been furnished by them to negative the likelihood that to allow them to recover at the pre-war rate of exchange would enrich them enormously at the expense of the defendant bank not only, but at the expense of a great many purchasers of drafts, who have no longer recourse against plaintiffs under the law.

CONCLUSION.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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February, 1927.

APPENDIX.

SECTION III.—*Debts.*

ARTICLE 248.

There shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties within three months of the notification referred to in paragraph (*e*) hereafter the following classes of pecuniary obligations:

(1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory;

(2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the existence of a state of war;

(3) Interest which has accrued due before and during the war to a national of one of the Contracting Powers in respect of securities issued or taken over by an Opposing Power, provided that the payment of interest on such securities to the nationals of that Power or to neutrals has not been suspended during the war;

(4) Capital sums which have become payable before and during the war to nationals of one of the Contracting

Powers in respect of securities issued by one of the Opposing Powers, provided that the payment of such capital sums to nationals of that Power or to neutrals has not been suspended during the war.

In the case of interest or capital sums payable in respect of securities issued or taken over by the former Austro-Hungarian Government the amount to be credited and paid by Austria will be the interest or capital in respect only of the debt for which Austria is liable in accordance with the Financial Clauses of the present Treaty, and the principles laid down by the Reparation Commission.

The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (*d*), and disposed of by them under the conditions provided by the said Section and Annex.

The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section:

(*a*) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices.

(*b*) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war.

(*c*) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor.

(*d*) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of the new States of Poland and the Czecho-Slovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the States interested.

(*e*) The provisions of this Article and of the Annex hereto shall not apply as between Austria on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period

of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Austria by the Government of such Allied or Associated Power or of such Dominion or of India as the case may be.

(*f*) The Allied and Associated Powers which have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and Austrian nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

ANNEX.

1.

Each of the High Contracting Parties will, within three months from the notification provided for in Article 248, paragraph (*e*), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing Office in their respective districts, except that all transactions with the clearing office in the Opposing State must be effected through the central Clearing Office.

2.

In this Annex the pecuniary obligations referred to in the first paragraph of Article 248 are described as "enemy

debts", the persons from whom the same are due as "enemy debtors", the persons to whom they are due as "enemy creditors", the Clearing Office in the country of the creditor is called the "Creditor Clearing Office", and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office".

3.

The High Contracting Parties will subject contraventions of paragraph (*a*) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

4.

The Government guarantee specified in paragraph (*b*) of Article 248 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

5.

Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will, in due course, inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case, the Debtor Clearing Office will give the grounds for the non-admission of debt.

6.

When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

7.

The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the

Creditor Clearing Office notice has been given by the Debtor Clearing Office that it is not admitted.

8.

When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

9.

The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses or commissions.

10.

Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, interest at 5 per cent. on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent. on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claims shall have been disallowed or the debt paid.

Each Clearing Office shall in so far as it is concerned take steps to collect the fines above provided for, and will be responsible if such fines cannot be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

11.

The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the Allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

12.

To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

13.

Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

14.

In conformity with Article 248, paragraph (*b*), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

15.

Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.

16.

Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

17.

Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

18.

Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to re-open and maintain a claim abandoned by the same.

19.

The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the information and documents in their possession, so as to enable the Tribunal to decide rapidly on the cases which are brought before it.

20.

Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit.

A fee of 5 per cent. of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

21.

With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned. Each of the Clearing Offices

will be at liberty to correspond with the other and to forward documents in its own language.

22.

Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent. per annum, except in cases where, by contract, law, or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Office and shall be credited to the Creditor Clearing Office in the same way as such debts.

23.

Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 248, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

24.

The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

25.

In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

SECTION IV.—*Property, rights and interests.*

ARTICLE 249.

The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto:

(*a*) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken in the territory of the former Austrian Empire with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners.

(*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the rights to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them, and are within the territories, colonies, possessions and protectorates of such Powers (including territories ceded to them by the present Treaty) or are under the control of those Powers.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.

Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso*

facto in accordance with its provisions the nationality of an Allied or Associated Power, including those who under Articles 72 or 76 obtain such nationality with the consent of the competent authorities, or who under Articles 74 or 77 acquire such nationality in virtue of previous rights of citizenship (*pertnienza*) will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph.

(*c*) The price or the amount of compensation in respect of the exercise of the right referred to in paragraph (*b*) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(*d*) As between the Allied and Associated Powers and their nationals on the one hand and nationals of the former Austrian Empire on the other hand, as also between Austria on the one hand and the Allied and Associated Powers and their nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(*e*) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an arbitrator

appointed by that Tribunal. This compensation shall be borne by Austria, and may be charged upon the property of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (*b*), within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Austria.

(*f*) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in the territory of the former Austrian Empire and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (*e*) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Austria shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph cannot be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (*e*) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights or interests of which he was deprived.

Through restitution in accordance with this Article, the price or the amount of compensation fixed by the application of paragraph (*e*) will be reduced by the actual value

of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(*g*) The rights conferred by paragraph (*f*) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice.

(*h*) Except in cases where, by application of paragraph (*f*), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, other than proceeds of sales of property or cash assets in Allied or Associated countries belonging to persons covered by the last sentence of paragraph (*b*) above, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Austria resulting therefrom shall be dealt with as provided in Article 189 of Part VIII (Reparation) of the present Treaty.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (*b*), received by an Allied or Associated Power

shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained, the cash value thereof shall be dealt with as provided in Article 189 of Part VIII (Reparation) of the present Treaty.

(*i*) Subject to the provisions of Article 267, in the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Austria, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 181 (Part VIII) and 211 (Part IX), be paid direct to the owner. If, on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(*j*) Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

(*k*) The amount of all taxes or imposts on capital levied or to be levied by Austria on the property, rights and interests of the nationals of the Allied or Associated Powers from November 3, 1918, until three months from the coming into force of the present Treaty, or, in the

case of property, rights or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners.

* * * * * *

ANNEX.

1.

In accordance with the provisions of Article 249, paragraph (*d*), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting

to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the former Austro-Hungarian Government in invaded or occupied territory, nor to such of the above-mentioned measures as have been taken by Austria or the Austrian authorities since November 3, 1918, all of which measures shall be void.

2.

No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Austria or by any Austrian national or by or on behalf of any national of the former Austrian Empire wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

3.

In Article 249 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy

property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4.

All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing

out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

5.

Notwithstanding the provisions of Article 249, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Austria to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trade-marks in third countries to the exclusion of the Austrian company, and these unique means of reproduction shall be handed over to the former company, notwithstanding any action taken under war legislation in force in the Austro-Hungarian Monarchy with regard to the latter company or its business, industrial property or shares. Nevertheless, the former company, if requested, shall deliver to the latter company derivative copies permitting the continuation of reproduction of articles for use within Austrian territory.

6.

Up to the time when restitution is carried out in accordance with Article 249, Austria is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated Powers, including companies and associations in which they are interested, that have been subjected by her to exceptional war measures.

7.

Within one year from the coming into force of the present Treaty the Allied or Associated Powers will specify the property, rights and interests over which they intend to exercise the right provided in Article 249, paragraph (*f*).

8.

The restitution provided in Article 249 will be carried out by order of the Austrian Government or of the authorities which have been substituted for it. Detailed accounts of the action of administrators shall be furnished to the interested persons by the Austrian authorities upon request, which may be made at any time after the coming into force of the present Treaty.

9.

Until completion of the liquidation provided for by Article 249, paragraph (*b*), the property, rights and interests of the persons referred to in that paragraph will continue to be subject to exceptional war measures that have been or will be taken with regard to them.

10.

Austria will, within six months from the coming into force of the present Treaty, deliver to each Allied or Asso-

ciated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

Austria will at any time on demand of any Allied or Associated Power furnish such information as may be required with regard to the property, rights and interests of Austrian nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights or interests effected since July 1, 1914.

11.

The expression "cash assets" includes all deposits or funds established before or after the existence of a state of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

12.

All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever, shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

13.

Within one month from the coming into force of the present Treaty, or on demand at any time, Austria will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within Austrian territory, and which concern the property, rights and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in the territory of the former Austrian Empire or in territory occupied by that Empire or its allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the Austrian Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

14.

The provisions of Article 249 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the

coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied.

15.

The provisions of Article 249 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 249, paragraph (*b*).

* * * * * *

SECTION VI.—*Mixed Arbitral Tribunal.*

ARTICLE 256.

(*a*) Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Austria on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.

If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall

be chosen by the other Government from the two persons mentioned above other than the President.

The decision of the majority of the members of the Tribunal shall be the decision of the Tribunal.

(*b*) The Mixed Arbitral Tribunals established pursuant to paragraph (*a*) shall decide all questions within their competence under Sections III, IV, V and VII.

In addition, all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and Austrian nationals shall be decided by the Mixed Arbitral Tribunal, always excepting questions which, under the laws of the Allied, Associated or Neutral Powers, are within the jurisdiction of the National Courts of those Powers. Such questions shall be decided by the National Courts in question, to the exclusion of the Mixed Arbitral Tribunal. The party who is a national of an Allied or Associated Power may nevertheless bring the case before the Mixed Arbitral Tribunal if this is not prohibited by the laws of his country.

(*c*) If the number of cases justifies it, additional members shall be appointed and each Mixed Arbitral Tribunal shall sit in divisions. Each of these divisions will be constituted as above.

(*d*) Each Mixed Arbitral Tribunal will settle its own procedure except in so far as it is provided in the following Annex, and is empowered to award the sums to be paid by the loser in respect of the costs and expenses of the proceedings.

(*e*) Each Government will pay the remunerations of the member of the Mixed Arbitral Tribunal appointed by it and of any agent whom it may appoint to represent it before the Tribunal. The remuneration of the President will be determined by special agreement between the Gov-

ernments concerned; and this remuneration and the joint expenses of each Tribunal will be paid by the two Governments in equal moieties.

(*f*) The High Contracting Parties agree that their courts and authorities shall render to the Mixed Arbitral Tribunals direct all the assistance in their power, particularly as regards transmitting notices and collecting evidence.

(*g*) The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

ANNEX.

1.

Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him.

2.

The Tribunal may adopt such rules of procedure as shall be in accordance with justice and equity and decide the order and time at which each party must conclude its arguments, and may arrange all formalities required for dealing with the evidence.

3.

The agent and counsel of the parties on each side are authorized to present orally and in writing to the Tribunal arguments in support or in defence of each case.

4.

The Tribunal shall keep record of the questions and cases submitted and the proceedings hereon, with the dates of such proceedings.

5.

Each of the Powers concerned may appoint a secretary. These secretaries shall act together as joint secretaries of the Tribunal and shall be subject to its direction. The tribunal may appoint and employ any other necessary officer or officers to assist in the performance of its duties.

6.

The Tribunal shall decide all questions and matters submitted upon such evidence and information as may be furnished by the parties concerned.

7.

The High Contracting Parties agree to give the Tribunal all facilities and information required by it for carrying out its investigations.

8.

The language in which the proceedings shall be conducted shall, unless otherwise agreed, be English, French, Italian or Japanese, as may be determined by the Allied or Associated Power concerned.

9.

The place and time for the meetings of each Tribunal shall be determined by the President of the Tribunal.

CONTENTS

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 180

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. Hauser, John S. Scully, et al., etc., Appellants

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN; Frank White, as Treasurer of the United States; and the Wiener Bank-Verein of Vienna, Austria

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF HOWARD SUTHERLAND AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 127) is reported in 7 F. (2d) 443. The opinion of the District Court (R. 57) is reported in 2 F. (2d) 629.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 11, 1925. (R. 132.)

The appeal to this Court has been prosecuted pursuant to Section 241 of the Judicial Code (c. 231, 36 Stat. 1157).

QUESTIONS PRESENTED

There are four substantial questions presented by the record for the determination of this Court:

(1) Whether an obligation of an Austrian bank to pay in Austria to a customer the balance of a general deposit account is discharged by compliance with an Austrian statute, which provides for the payment of a debt by a prescribed deposit in court, in the circumstances involved in this proceeding.

(2) Assuming that the statutory deposit did not have this effect, was this obligation matured by the outbreak of war between the United States and Austria, or by the provisions of the Trading with the Enemy Act, or by any demand for payment made by the appellants upon the bank so as to support the suit herein?

(3) Assuming that the obligation has not been discharged by the operation of the Austrian statute, and has been matured by one of these methods, as of what time shall the rate of exchange be fixed for the purpose of making the necessary translation from the Austrian currency (kronen) in which the debt was payable in Austria, to its equivalent in

value in American dollars in which the judgment will be payable;

(4) Are any of the provisions of the Treaty of Vienna between the United States and Austria (42 Stat. 1946) applicable to the situation involved herein?

STATEMENT OF THE CASE

The appellants instituted the present suit under the provisions of Subsection (a) of Section 9 of the Trading with the Enemy Act (c. 241, 41 Stat. 977) to recover the amount of its bank balance with the Wiener Bank Verein from money of this institution seized under the Act and covered into the Treasury of the United States.

For a number of years prior to the outbreak of the war on December 7, 1917, between the United States and Austria, the appellants were depositors in the Wiener Bank Verein. (R. 36.) On April 6, 1917, the appellants had a balance of 2,063,799.03 kronen, standing to their credit after the deduction of certain setoffs. (R. 19.) The appellants seek to recover the equivalent in United States currency, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria, namely, 11.18 United States cents for each Austrian krone. (R. 37, 47.)

No demand to close out the account was ever made by appellants prior to the beginning of the

war with Austria. (R. 101.) During the hostilities the bank made certain payments to the appellants' account (R. 108), and upon the resumption of communication after the war business dealings were continued.

On April 1, 1920, the bank deposited in the appropriate court the number of kronen standing to the credit of the appellants on April 6, 1917 (R. 37), in compliance with Section 1425 of the General Civil Code of Austria, which provides as follows (R. 37):

> If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor.

On December 15, 1921, the appellants "filed with the Alien Property Custodian a notice of their claim on said debt under oath and in such form and containing such particulars as the said Custodian required, and have not filed an application to the President of the United States for the allowance of said claim, all in pursuance of the provisions of the Trading with the Enemy Act and the

amendments thereto" (R. 16, 24), and on or about February 10, 1922, instituted the present proceedings. (R. 18.)

The District Court held that the deposit of the money into court as provided in the foregoing section of the Austrian Civil Code, was ineffective to discharge the obligation (R. 64), and further held (R. 64) that the following cable, sent by the appellants to the bank on August 12, 1919 (R. 62), or August 15, 1919 (R. 109), constituted a sufficient demand to mature the obligation (R. 109, 110):

> Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute.

As a consequence the court decided that—

> Plaintiffs may have a decree for the value of their deposit in dollars calculated at the rate of exchange prevailing as between kronen and dollars upon August 12, 1919, with interest from that date. (R. 65.)

This amounted to $50,919.97 with interest aggregating $14,766.80. (R. 68.)

From this decree the present appellees appealed to the Circuit Court of Appeals for the Second Circuit where it was held that the foregoing cable

did not constitute a demand for the payment of the balance on deposit, and that no demand had been made prior to April 1, 1920, and that there having arisen "a difference of opinion as to the rate at which plaintiffs' old account would be available for exchange" (R. 132), and the jural relations of the parties being subject to the Austrian law (R. 129) "payment into Court of all the kronen due was a complete extinguishment of plaintiffs' demand on the Wiener Bank." (R. 132.) The decree below was thereupon reversed and the court below directed to dismiss the bill.

SUMMARY OF ARGUMENT

(1) The obligations assumed by the bank to its depositors involved performances in Austria. Consequently, on familiar principles, the question as to what constitutes promissory compliance must be determined by a reference to the provisions of the Austrian law.

Furthermore, the contract between the parties expressly so provided. (R. 42.) An Austrian statute provided for the satisfaction of a debt, by a payment into court where "the creditor is * * * dissatisfied with the offer, or because of other important reasons." Such a situation existed by reason of the sharp differences of opinion over the matter of the applicable rate of exchange, and in compliance with the statute the bank paid the balance standing to the credit of the appellants into court in the currency of the forum, and gave the

prescribed notice thereof. As a consequence, therefore, the obligations of the bank were discharged. Hence there are no subsisting rights which can be enforced in an American tribunal.

(2) The declaration of war on December 7, 1917, was suspensory in its operation and did not constitute the equivalent of a demand for payment. It is doubtful if the provisions of the Trading with the Enemy Act, Sections 8 (a) and 9 (a), contemplate the payment of debts owing to nonenemies out of seized property, unless due at the time of the institution of suit. There was no sufficient demand by the appellants upon the bank for the payment of the balance. It is submitted, therefore, that the obligation of the bank had not been matured so as to warrant the institution of suit.

(3) Assuming, however, that the invocation of the Austrian statute did not operate as argued above, and assuming further that the obligation of the Austrian Bank to pay the deposit balance had been matured, the appellants are only entitled to recover that number of dollars which would be the equivalent in value of Austrian kronen at their exchange value at the date of the institution of this suit, which was in February, 1922. The record does not give this exchange data, but doubtless it can be agreed upon as a matter of common knowledge.

(4) The Treaty of Peace between Austria and the United States (42 Stat. 1946), proclaimed November 17, 1921, is inapplicable to the circum-

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stances of the case, and its provisions entirely immaterial to the determination of any question arising herein.

ARGUMENT

I

THE PAYMENT INTO COURT PURSUANT TO AUSTRIAN LAW OF THE NUMBER OF AUSTRIAN KRONEN STANDING TO THE CREDIT OF THE APPELLANTS OPERATED TO DISCHARGE ALL THE OBLIGATIONS OF THE FORMER

(a) The question of what constituted performance of the duties of the bank to its depositors or its legal equivalent is to be determined by the law of the place of performance.

As the court below said, the jural relationship between the parties "was admittedly that of depositor and banker, and there is no evidence that the nature of that common relation is not the same under * * * Austrian and American law" (R. 129). The contract on behalf of the bank was to pay on demand and at its banking establishment. This was in Vienna. Therefore, any question as to what constituted performance, by original definition or statutory substitution, must be referred for solution to the law of Austria.

The foregoing follows from principles long familiar in judicial utterance.

Hall v. *Cordell*, 142 U. S. 116.
Pritchard v. *Norton*, 106 U. S. 124.
Andrews v. *Pond*, 13 Pet. 65.
Story, Conflict of Laws, 8th ed., Sec. 280.
Dicey, Conflict of Laws, 3rd ed., pp. 609, 610.

Furthermore, the parties have expressly stipulated, among else, that

> The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be. (R. 42, 43.)

No good reason suggests itself why the wishes of the contracting parties in this respect should not be given the effect desired.

(b) Section 1425 of the General Civil Law Code of Austria, passed prior to the beginning of relations herein, and in force at the time of its invocation, provided so far as material (R. 37):

> If a debt can not be paid because the creditor is * * * dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute * * *. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor.

A situation such as contemplated by the law had developed in a dispute over the determination of the controlling date for dealing with the pertinent question of international exchange, a consideration of paramount importance on the question as to the

amount of the recovery. It is apparent, that under the circumstances, the debt could not be paid for at least one, and possibly two, of the reasons assigned in the statute. It is, therefore, applicable to the case.

On or about April 1, 1920 (R. 37), the Weiner Bank Verein made the statutory deposit of the entire balance standing to the credit of the appellants in the legal currency of the forum—Austrian kronen, of course—and the notice prescribed in the statute was given (R. 38).

It follows, therefore, that the bank thereupon acquired a statutory discharge of its obligations in the premises, and the appellants' rights were doubtless transferred to a claim against the funds *in custodia legis.*

II

ASSUMING THAT THE STATUTORY DEPOSIT DID NOT HAVE THE EFFECT CONTENDED FOR HEREIN, WAS THE OBLIGATION TO PAY APPELLANTS' BANK BALANCE MATURED SO THAT THE PROCEEDINGS HEREIN ARE MAINTAINABLE?

It is familiar learning that as a general rule no suit may be maintained against a bank for the recovery of a deposit balance until the depositor has made a demand therefor and been refused.

Leather Manufacturers' Bank v. *Merchants' Bank,* 128 U. S. 26 at page 34.
Payne v. *Gardiner,* 29 N. Y. 146 at 168.

Koelzer v. *First National Bank*, 125 Wis. 595.

Smiley v. *Fry*, 100 N. Y. 262.

A claim to recover an amount on deposit in an enemy bank out of funds of the bank seized under the Trading with the Enemy Act would seem to stand on no different footing.

Appellants seek to avoid the consequences of the general rule by arguing that the provisions of Section 9 (a) permit the recovery out of funds seized under the Trading with the Enemy Act of a debt that was owing on October 6, 1917, regardless of whether the debt was due on that date. Sections 9 (a) and 9 (e) (c. 241, 41 Stat. 977, 978, 980) provide, so far as material to this consideration, as follows:

> (a) That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed * * * or paid to the Alien Property Custodian * * *, and held by him or by the Treasurer of the United States * * * may * * * institute a suit in equity * * * in the district court of the United States for the district in which such claimant resides * * * to *establish* the * * * debt so claimed, and *if so established* the court shall order the payment * * * to said claimant * * *. (Italics ours.)
>
> * * * * *
>
> (e) * * * nor in any event shall a debt be allowed under this section unless it

> was owing to and owned by the claimant prior to October 6, 1917 * * *.

The provisions of the statute bar the recovery of a debt that was not *owing* prior to October 6, 1917. It does not follow that the statute permits the collection of debts which were owing to enemies before the war but not due. The statute provides for suit to "establish" the debt and "if so established" directs the payment out of the property. This clearly implies that the debt must be one for which a suit could have been brought against the enemy. For example, if appellants' argument is sound, an American citizen holding a bond upon which an enemy was an obligor but which was payable 50 years after date, could secure payment of the bond immediately out of the enemy's property seized under the Trading with the Enemy Act. It would be impossible, however, under such circumstances, for the Court to establish a debt against the enemy since the establishment of a debt implies an ascertainment of an obligation to pay.

Further Congress has dealt expressly with the situation presented in this case in Section 8 (a) of the Trading with the Enemy Act (c. 106, 40 Stat. 411, 418). This section provides in part:

> * * * any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for termination thereof upon notice or for *acceleration of maturity* on presentation or *demand*,

> * * * may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe * * *. (Italics ours.)

If the views presented by the appellants are correct, then this section is entirely superfluous.

Appellants' next contention is that an account was stated as of April 6, 1917, by the letter written by the Austrian bank to appellants on April 1, 1920 (R. 108 ff.). The contents of this letter negative any idea of an intention on the part of the Austrian bank to state an account in the technical sense of the word, and this is emphasized by the following extract from the letter (R. 108–109):

> * * * there was at no time during the war or afterwards a prohibition in Austria to effect payments on behalf of Americans out of the balances kept here, and for instance, as you will have noticed from our correspondence, we never discontinued our payments to Mr. Martin Teschner, in whose favour a monthly credit had been opened by your radio of September 18th 1916.
>
> In consequence hereof we effected, as a rule, during the whole war any payments for our American clients which had been ordered to us, and when in April 1919 postal relations were resumed, we continued the accounts kept with us without making

any distinction between pre-war balances and new balances.

Contrary to showing an intention to state an account the letter clearly indicates the insistence of the bank that the relations between the parties had continued even during the war.

Appellants further insist, on the basis of an elaborate discussion, that the outbreak of war automatically terminated the contract and, since they seek a judicial remedy, that new rights were necessarily created in lieu thereof. It would serve no useful purpose to discuss in detail the numerous subsidiary points evolved, nor the authorities considered. We are unable to agree that the principles invoked are relevant, or that the cases cited are applicable or controlling. The appellants have not succeeded in escaping in any wise from the obvious fact that the relation of the parties is simply that of debtor and creditor, the normal situation where one deposits money in a bank (furnishes an executed consideration), and the latter agrees to pay it back on demand at one time or in various installments, according to business usage. The obligation of the bank in such a case consists of a unilateral promise.

War operates to suspend the performance of the promissory undertaking, though if the obligation runs to an enemy, doubtless it may be sequestrated or confiscated. If the war terminated the unilateral obligation, as the appellants assert, they would be promptly out of court altogether. If there were

no assets of the promissor in the United States, the remedy would revive upon the cessation of hostilities, provided, of course, the substantive rights were not affected by confiscatory legislation. In our case, since assets of the enemy obligor are within the country, the debt may be liquidated to the extent thereof by legislative privilege.

The character of the substantive foundation of the proceedings, however, remains unchanged. There has been no extinguishment of any contractual duties and no creation of new obligations. The creditor, however, has been given an additional remedy. It is our submission, therefore, that the contract in question consists of a unilateral promise which was not discharged by the outbreak of war, but upon which all remedies were suspended until Congress enabled the creditor to reach domestic assets of the debtor.

Sutherland v. *Mayer*, 271 U. S. 272.
Hanger v. *Abbott*, 6 Wall. 532.

Nor does the alleged notice of claim filed with the Custodian on March 19, 1919 (R. 49–56) constitute a notice for the purpose of maturing the obligation of the bank under Section 8(a) of the Trading with the Enemy Act, *supra*. On its face, this is a notice of claim under Section 9 of the Act, filed as a condition precedent to securing a payment of an obligation thereunder. The provisions of Section 8(a) provide for filing of notice to accelerate the maturity of an obligation. The notice of March 19, 1919, does not purport to be such a notice.

Neither does the cablegram of August 12, 1919 (R. 62, 109), sent by the appellants to the bank in any sense constitute a demand for payment.

It is conceded by the appellants that there was no actual demand prior to the war upon the bank for the payment of the deposit balance (R. 101), and from the foregoing it is clear that there can not be spelled out of the facts any theory upon which it can be said that on April 6, 1917, there was immediately due and payable to the plaintiffs any money from the bank.

Under no theory, therefore, can it be said that there was at the time this action was instituted a debt which had been fully matured and was subject to immediate suit.

III

IF THE APPELLANTS ARE ENTITLED TO RECOVER HEREIN, THE AWARD MUST BE LIMITED TO THE EQUIVALENT IN DOLLARS OF THE NUMBER OF KRONEN INVOLVED AT THE RATE OF EXCHANGE PREVAILING ON THE DAY THE PROCEEDINGS WERE BEGUN

As the obligation incurred by the bank was to repay the money on demand in Austria in kronen, the case is governed by the decision of this Court in *Die Deutsche Bank Filiale* v. *Humphrey*, No. 224, Oct. Term, 1926 (decided November 23, 1926, 47 Sup. Ct. Rep. 166), fixing the commencement of the suit as the controlling time.

The action was commenced some time in February, 1922, apparently between the date of the veri-

fication of the bill on February 10, 1922 (R. 18), and the date of the issuance of the subpœna on February 28, 1922. (R. 1.) Just what the prevailing exchange was at the time is not disclosed by the record. It will necessarily be a matter to be established after remand, though as the matter is one easily determined it can very readily be disposed of on stipulation.

The case at bar is distinguishable from the case of *Hicks* v. *Guinness*, 269 U. S. 71, in that the obligation for which suit was brought in the *Guinness case* was payable in the United States.

In an elaborate effort to avoid the controlling effect of the *Humphrey case*, appellants attempt to evolve the following distinction (Brief, p. 24):

> It therefore appears that the only ground of distinction between these cases is that in the Guinness case the situs of the plaintiffs, at the time the debt became due, was the United States, whereas, in the Humphrey case the situs of the plaintiff, at the time the debt became due, was Germany.

The question of residence is not of the slightest consequence except as material to the inquiry as to where the promise was to be performed. In our case it appears that performance was to be in Austria, and all discussion as to the residence or domicile of the creditors is wide the mark.

IV

THE FACTS HEREIN DO NOT FALL WITHIN ANY OF THE PROVISIONS OF THE TREATY OF VIENNA BETWEEN THE UNITED STATES AND AUSTRIA OF AUGUST 24, 1921

The appellants submit that under the Treaty they are entitled to have the benefit of the pre-war rate of exchange for United States dollars and Austrian kronen. No question is made of the validity of the Treaty or any of its provisions. We confine ours exclusively to a denial of its applicability.

Article II of the Treaty of Vienna (42 Stat. 1946, 1948) provides:

> With a view to defining more particularly the obligations of Austria under the foregoing Article with respect to certain provisions in the Treaty of St. Germain-en-Laye, it is understood and agreed between the High Contracting Parties:
>
> (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States which it is intended the United States shall have and enjoy, are those defined in Parts V, VI, VIII, IX, X, XI, XII and XIV.

The question resolves itself then into an inquiry as to the scope of the advantages conferred on an American national in the situation of the appellants.

Appellants first direct our attention to Part X entitled "Economic Clauses" and particularly to Articles 248, 249, and 250 of Section IV of said Treaty of St. Germain-en-Laye. (Treaties, Conventions, etc., between the United States of America

and Other Powers, Senate Document No. 348, 67th Congress, 4th Session, p. 3149 ff.)

Subsection h(2) of Article 249 of the Treaty of St. Germain provides (p. 3244):

> As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b), received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and, if retained, the cash value thereof shall be dealt with as provided in Article 189, Part VIII (Reparation), of the present Treaty.

The United States did not adopt Section III and the annex thereto, referred to in this provision.

Paragraph 4 of the Annex to Section IV, which contains Article 249, provides (p. 3247):

> All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Asso-

ciated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

Paragraph 14 of the annex to Section IV, which contains Article 249, provides (p. 3248):

> The provisions of Article 249 and the Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to

debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied.

Subsection (d) of Article 248 of Section III of the Treaty of St. Germain makes provision for the payment of debts, etc., providing as follows:

> Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency, they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.
>
> For the purpose of this provision, the pre-war rate of exchange shall be defined as the

> average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.
>
> If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.
>
> In the case of the new States of Poland and the Czecho-Slovak State, the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the States interested.

It is the contention of appellants that the obligation which they are seeking here to collect out of the money of the Austrian bank, which was seized by the Custodian, falls within the foregoing provisions of the Treaty of St. Germain-en-Laye, which is a part of the Treaty between the United States and Austria, and that the rate of exchange provided with respect to debts referred to in the Treaty is applicable to the appellants' debt against the Austrian bank.

It is submitted that a debt claimed under Section 9 of the Trading with the Enemy Act is not embraced within the provisions of this Treaty. It is probable from the provisions of paragraph 4 of

the Annex to Article 249 that the debts for which provision is there made were debts which were to be settled by arbitration before a named arbitrator or before the Mixed Arbitral Tribunal provided for in Section VI of the Treaty. It is apparent from the provisions of the body of the Treaty between the United States and Austria that that Treaty incorporated certain provisions of the Joint Resolution of Congress of July 2, 1921, c. 40, 42 Stat. 105, which brought the war to an end. Section 5 of this Joint Resolution, in so far as applicable, provides (42 Stat. 106):

> All property of the * * * Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as * * * the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have * * * made suitable provision for the satisfaction of all claims against said Government * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United

> States of America and who have suffered, through the acts of the * * * Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914 * * *.

This provision of the Treaty, in conjunction with the permissive character of the provisions of the Treaty of St. Germain incorporated therein, indicates that the Treaty simply permitted the United States to avail itself of enemy property to satisfy claims of American citizens of every kind, class, and character. There has been no legislation which purports to be an acceptance by the United States of the permission granted by these provisions of the Treaty. Certainly Section 9 (a) of the Trading with the Enemy Act can not be said to be such legislation, since Section 9 (a), in substantially the same form as it now exists, was enacted on October 6, 1917, the very beginning of the war.

Furthermore, the specific provisions of Subsection h (2) of Article 249, *supra*, upon which the claimants rely, provide in the last sentence that any property not used as provided for therein, that is, amongst other things, not used to satisfy debts of which the appellants claim theirs is one, may be retained by the Allied or Associated Powers, and if retained, "the cash value thereof *shall* be dealt with as provided for in Article 189" of the Treaty of St. Germain, which is also part of the Treaty between the United States and Austria. Article 189 provides (Treaties, Conventions, etc., p. 3205):

> The following shall be reckoned as credits to Austria in respect of her reparation obligations:
>
> (a) any final balance in favour of Austria under Sections III and IV of Part X (Economic Clauses) of the present Treaty;
>
> (b) amounts due to Austria in respect of transfers provided for in Part IX (Financial Clauses) and in Part XII (Ports, Waterways, and Railways);
>
> (c) all amounts which, in the judgment of the Reparation Commission, should be credited to Austria on account of any other transfers under the present Treaty of property, rights, concessions or other interests.
>
> In no case, however, shall credit be given for property restored in accordance with Article 184.

If appellants' contention is sound, after debts against the Austrian bank have been paid pursuant to Section 9 (a) of the Trading with the Enemy Act, the United States must pay the cash value of whatever property of the Austrian bank it has in its possession to the credit of Austria in respect of her reparations obligations. This certainly reduces appellants' argument as to the provisions of the Treaty of St. Germain-en-Laye to an absurdity, since the Trading with the Enemy Act specifically provides in Section 12 (c. 106, 40 Stat. 411, 424):

> After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the

> Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * * *.

With minor exceptions, which are not material here, Congress has made no provision for the disposition of enemy property in the possession of the Custodian or in the Treasury of the United States.

In the case of *Hicks* v. *Guinness,* 269 U. S. 71, precisely the same arguments were urged on behalf of the claimants as to those provisions of the Treaty of Versailles which were incorporated in the Treaty between the United States and Germany, identical with the provisions quoted above from the Treaty of St. Germain.

This Court, however, in dealing with circumstances similar to those involved herein, except that the debt had matured prior to the war and the debt was payable in the United States, held that the decision of the case made it unnecessary to consider any arguments drawn from the Treaty. Since in the *Guinness case* this Court held that the rate of exchange to be used under circumstances present in that case was the rate existing at the date of the breach of the contract to pay, and since the date of the breach of the contract in the case was December 31, 1916, several months before the date as of which the Treaty provided the rate of exchange, it is submitted that the Court in refusing to consider the Treaty provisions inferentially held them inapplicable to such a situation. Furthermore, when the *Guinness case* was in the Circuit

Court of Appeals (299 Fed. 538) that court discussed the provisions of the Treaty of Versailles and held them inapplicable to a claim under Section 9.

While in the case of *Die Deutsche Bank Filiale* v. *Humphrey, supra,* the Treaty provisions were not presented for consideration, nevertheless if the Treaty provisions were relevant the decision in its result was incorrect. In view of the fact, however, that the *Guinness case* was the principal case upon which the respondent relied, it seems fair to infer that this Court was not unmindful of the Treaty provisions at the time the *Die Deutsche Bank case* was decided.

It is, therefore, submitted that the provisions of the Treaty of Vienna can have no application to the present case.

CONCLUSION

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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